Supreme Court, U.S.
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No. 91-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WINTERTHUR REINSURANCE CORP. OF AMERICA,
Petitioner,

v.

STATE OF CALIFORNIA, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a lower court may confer antitrust standing upon plaintiffs who the court finds do not satisfy all the relevant standing factors set forth in *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 159 (1983).

2. Whether the court of appeals' decision to confer standing on plaintiffs who did not participate in the same market as petitioner and whose injuries, if any, flowed indirectly from an alleged boycott aimed at participants in a separate market in which the plaintiffs did not purchase is consistent with fundamental antitrust policies underlying this Court's analysis in *Associated General Contractors*.

3. Whether domestic insurance companies whose conduct otherwise would be exempt from the federal antitrust laws under the McCarran-Ferguson Act lose that exemption because they participate with foreign reinsurers in the business of insurance.

4. Whether agreements among primary insurers and reinsurers on such matters as standardized advisory insurance policy forms and terms of insurance coverage constitute a "boycott" outside the exemption of the McCarran-Ferguson Act.

5. Whether state insurance departments' review and approval of proposed advisory insurance forms establish a "state action" defense to allegations under the antitrust laws that primary insurers and reinsurers conspired as to the terms of these standardized forms.

PARTIES BELOW

This action originally was brought by the States of Alabama, Arizona, California, Massachusetts, Minnesota, New York, West Virginia, and Wisconsin. The litigation subsequently was joined by the States of Alaska, Colorado, Connecticut, Louisiana, Maryland, Michigan, Montana, New Jersey, Ohio, Pennsylvania, and Washington, and by a number of private plaintiffs, 14 of which appealed from the district court's adverse decision and thus were parties in the court of appeals (Ace Check Cashing, Inc.; Acme Corrugated Box Co.; Anastasios Markos T/A Municipal Exxon; Bay Harbor Park Homeowner's Association; Bensalem Township Authority; Big D Building Supply Corp.; Carlisle Day Care Center, Inc.; Durawood, Inc.; Environmental Aviation Sciences, Inc.; Jerry Grant Chemical Associates, Inc.; Keyboard Communications, Inc.; Carmella M. "Boots" Liberto T/A R.J. Liberto, Inc.; P&J Casting Corp.; and Henry J. Rosenfeld).

The 32 defendants are: (1) four primary insurance companies: The Aetna Casualty and Surety Co.; Allstate Insurance Co.; Hartford Fire Insurance Co.; and Insurance Company of North America and its corporate parent, CIGNA Corp.; (2) Insurance Services Office, Inc. ("ISO"), a licensed property-casualty rating and advisory organization consisting of 1400 insurance companies participating in the United States; (3) six domestic reinsurance companies: Constitution Reinsurance Corporation; General Reinsurance Corporation; Mercantile & General Reinsurance Company of America; North American Reinsurance Corporation; Prudential Reinsurance Company; and Winterthur Reinsurance Corp. of America; (4) the Reinsurance Association of America ("RAA"), an association of domestic reinsurers; and (5) 17 foreign reinsurers, including two individuals: Merrett Underwriting Agency Management Limited; Three Quays Underwriting Management Limited; Janson Greene Management Limited; Edwards & Payne (Underwriting Agencies) Lim-

ited; C.J.W. (Underwriting Agencies) Limited; Murray Lawrence & Partners; Oxford Syndicate Management Limited; D.P. Mann Underwriting Agency Limited; J. Brian Hose and Others, Ltd.; Unionamerica Insurance Co., Ltd.; CNA Re (U.K.) Ltd.; Terra Nova Insurance Co., Ltd.; Excess Insurance Company Limited; Kemper Re (U.K.) Ltd.; Continental Reinsurance Co. (U.K.) Ltd.; Robin A.G. Jackson; and Peter N. Miller; and (6) one domestic and two foreign reinsurance brokers: Thomas A. Greene & Co., Inc.; Ballantyne, McKean & Sullivan, Ltd.; and R.K. Carvill & Co., Ltd.

The petitioner herein is the Winterthur Reinsurance Corp. of America, a domestic reinsurance corporation. A separate petition is being filed by the domestic primary insurance entities, their licensed rating organization, the domestic reinsurers (other than Winterthur), and the trade association of the domestic reinsurers. A third petition is being filed by the foreign reinsurers and related individuals.

RULE 29.1 STATEMENT

Winterthur Reinsurance Corp. of America has no subsidiaries. 100% of its stock is owned by Winterthur U.S. Holdings, Inc. The stock of Winterthur U.S. Holdings, Inc. is held in trust by the Bank of New York for the beneficial owner, Winterthur Swiss Insurance Co.

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PETITION FOR A WRIT OF CERTIORARI

Winterthur Reinsurance Corp. of America hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 938 F.2d 919 (9th Cir. 1991). The opinion of the district court (App. B) is reported at 723 F. Supp. 464 (N.D. Cal. 1989).

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1991. Timely petitions for rehearing were denied on October 15, 1991 (App. C). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 4 of the Clayton Act, 15 U.S.C. § 15, in pertinent part provides:

> . . . [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 16 of the Clayton Act, 15 U.S.C. § 26, in pertinent part provides:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity . . . .

STATEMENT OF THE CASE

These consolidated civil actions were filed by nineteen state attorneys general and numerous private parties against a group of defendants consisting of insurance companies, reinsurance companies, brokers, and others. The actions charge that the defendants violated federal antitrust and state laws by engaging in conspiracies to restrict the availability of commercial general liability insurance and reinsurance, causing injury to insurance consumers, like the plaintiffs.

Petitioner Winterthur Reinsurance Corp. of America ("Winterthur") is a domestic reinsurance company that, along with other defendant reinsurance companies, is alleged to have refused to sell reinsurance to other insur-

ance companies. Neither Winterthur nor any of the other "reinsurer" defendants is alleged to have sold or refused to sell insurance to any of the plaintiffs. Similarly, no plaintiff is alleged to have purchased or attempted to purchase reinsurance. Nevertheless, plaintiffs were deemed to have antitrust standing to sue Winterthur and the other reinsurer defendants.

1. *Background.* According to plaintiffs' allegations, comprehensive general liability insurance ("CGL") is insurance that protects the insured against the risk of liability to third parties for bodily injury or property damage. It is purchased by businesses, nonprofit organizations, and government entities. So-called "primary insurers" provide CGL insurance directly to insureds, like the plaintiffs. So-called "reinsurers" (such as petitioner) provide reinsurance only to other insurance companies (both primary insurers and reinsurers). Reinsurers do not provide CGL insurance policies to plaintiffs or other consumers.

CGL insurance policies are written primarily on standard policy forms that are developed by the Insurance Services Office, Inc. ("ISO"), an association of more than one thousand primary insurers, which files such standardized forms with state insurance departments. Plaintiffs allege that the defendant primary insurers became dissatisfied with existing ISO forms for CGL insurance. These primary insurers allegedly sought to have the ISO forms modified to limit coverage to "claims made" during the policy term, and to eliminate coverage for accidental pollution claims. To achieve this goal, they allegedly pressured ISO to amend the standard CGL forms and induced defendant reinsurers to refuse to provide reinsurance to insurers writing CGL policies on existing ISO forms. Ultimately, ISO amended its standard CGL forms.

2. *The Complaints.* Commencing in 1988, nineteen state attorneys general [1] and numerous private entities

[1] The attorneys general sued on behalf of their respective states and classes of state governmental agencies, and as *parens patriae*

filed complaints seeking treble damages and injunctive relief under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26. These complaints alleged that defendants had engaged in various conspiratorial acts designed to restrict the scope of CGL insurance coverage in the new ISO forms.[2]

The complaints describe several distinct insurance markets. First, the complaints allege a primary CGL insurance market; in that primary market, the plaintiffs are the buyers and the primary insurers are the sellers. Cal. Cmplt., ¶¶ 4(j), 24; Conn. Cmplt., ¶¶ 4(o), 39. Winterthur does not sell CGL insurance in the primary insurance market. Cal. Cmplt., ¶ 19; Conn. Cmplt., ¶ 17.

The complaints also allege as a separate market the "reinsurance" market, where reinsurers (like Winterthur) sell reinsurance to other insurance companies. Cal. Cmplt., ¶¶ 4(o), 26; Conn. Cmplt., ¶¶ 4(p), 40. "Only insurance companies purchase reinsurance." Cal. Cmplt., ¶ 26; See Conn. Cmplt., ¶ 4(p). Plaintiffs do not claim to have participated in the reinsurance market.[3]

Winterthur is alleged to have conspired with certain other defendants (i) to restrict the terms on which *reinsurance* would be offered to insurance companies and

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on behalf of the general welfare and economy of their respective states.

[2] The state complaints fell into two groups, depending on when they were filed. The so-called "first wave" complaints were patterned after the March 22, 1988 complaint filed by the State of California (hereinafter, "Cal. Cmplt."); the so-called "second wave" complaints were patterned after the June 14, 1988 complaint filed by the State of Connecticut (hereinafter, "Conn. Cmplt."). The private complaints are substantially identical to the states' complaints. In all cases, the plaintiffs sued as purchasers or potential purchasers of CGL insurance policies from primary insurers.

[3] Yet another market described in the complaints is the "retrocessional" reinsurance market. Retrocessional reinsurance is reinsurance provided by one reinsurer to another reinsurer. Cal. Cmplt., ¶ 107; Conn. Cmplt., ¶ 4(r).

(ii) to refuse to provide *reinsurance* coverage unless ISO amended its proposed CGL policy forms. Cal. Cmplt., ¶¶ 113, 123; Conn. Cmplt., ¶¶ 117, 122. Although the defendant primary insurers are named as alleged participants in the conspiracy claims involving Winterthur, Winterthur is alleged only to have engaged in unlawful acts in the *reinsurance* market.

3. *The District Court's Decision.* The various actions were consolidated in the United States District Court for the Northern District of California under MDL No. 767. Defendants moved to dismiss all the actions on the grounds, *inter alia*, that the McCarran-Ferguson Act and the state action doctrine conferred antitrust immunity on defendants. In addition, Winterthur and other reinsurer defendants moved to dismiss the claims against them on the ground that plaintiffs lacked standing under the antitrust laws to complain of actions allegedly taken in the reinsurance market. The district court—without engaging in the antitrust standing analysis mandated by *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983) —ruled that plaintiffs did have standing to sue. App. at 65a-67a. However, the district court granted the motion of all defendants to dismiss the action based on the state action and/or McCarran-Ferguson Act defenses. *Id.* at 58a, 63a.

4. *The Court of Appeals' Decision.* By opinion dated June 18, 1991, the U.S. Court of Appeals for the Ninth Circuit reversed and remanded the judgment of dismissal. *Id.* at 1a-32a. In its opinion, the court of appeals upheld the district court's ruling that the plaintiffs had antitrust standing to sue the reinsurer defendants.[4] *Id.* at 14a-17a.

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[4] One aspect of the court of appeals' ruling on standing requires clarification. The opinion states that "domestic reinsurers concede the presence of the factors that establish standing." App. at 17a. Winterthur is a domestic reinsurer, but it did not concede standing in the court of appeals. See Brief of Appellees at 6 n.3 & 89 n.86.

In concluding that plaintiffs had standing to sue the reinsurer defendants, the court of appeals reviewed what it characterized as "the five factors set out in *Associated General Contractors*." App. at 15a. *First*, the court elevated into a factor the "specific intent of the alleged conspirators," and ruled that the "reinsurer defendants are alleged to have intended to restrict the kinds of insurance available to the plaintiffs." *Id. Second*, although acknowledging that the alleged conduct of the reinsurers "took effect through the primary insurers," the court nevertheless ruled that the alleged injury to plaintiffs could be termed "direct." *Id.*

With regard to the *third* factor under *Associated General Contractors*—the "character of the damages"—the court expressed more doubt. It acknowledged that "the proof may be complex." App. at 15a. Nevertheless, while "the character of the damages is against standing," the court concluded that "the net balance as to damages is in favor of standing." *Id.* at 16a.

The *fourth* factor identified by the court was the existence of other, more appropriate plaintiffs. The court acknowledged that the "primary insurers who were denied reinsurance could have brought suit," but opined that they were "unlikely to desire" to do so. *Id.* The court concluded that "[r]ealistically, no more appropriate class of plaintiffs exists." *Id.*

As to the *fifth* factor—the nature of plaintiffs' injury—the court first observed that "a plaintiff who is 'neither a competitor nor a consumer' in the relevant market does

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In fact, Winterthur filed a joinder to the petition for rehearing in the court of appeals that expressly noted: "Contrary to the panel's statement, Winterthur, a domestic reinsurer, does not concede the presence of the factors that establish standing." Joinder in Petition for Rehearing and Suggestion for Rehearing *En Banc* at 2. It is possible that the court may have erroneously considered Winterthur a foreign reinsurer rather than a domestic reinsurer. See App. at 8a. In any event, the court indicated that—as to standing—"[t]he foreign reinsurers have no characteristics that distinguish them from the domestic reinsurers." *Id.* at 17a.

not suffer 'antitrust injury.'" *Id.* The court nonetheless ruled that plaintiffs—as "consumers" of CGL insurance —should have standing to sue for any violation that "choked off" competition without regard to whether the affected competition was in the market where the plaintiffs were consumers. *Id.*

The court concluded that because "[a]lmost all" of the *Associated General Contractors* factors supported standing, "the plaintiffs have standing to maintain this antitrust suit against all defendants." App. at 16a, 17a.

REASONS FOR GRANTING THE PETITION

Summary of Argument

1. The test for antitrust standing set forth in *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983), is currently being applied in divergent ways by the circuit courts. This Court should clarify the parameters of the *Associated General Contractors* test, and thereby eliminate the confusion that is reflected in the lower courts' application of that test.

The doctrine of antitrust standing has long been a quagmire. Prior to 1983, a slew of rigid, contradictory rules had been developed by the circuits to govern the scope of standing under Section 4 of the Clayton Act. In 1983, however, this Court handed down its decision in *Associated General Contractors* in order to establish a uniform, policy-based test for determining whether an antitrust plaintiff has standing to sue.

In *Associated General Contractors*, this Court expressly refused to embrace any of the numerous tests for antitrust standing that were then being used by the lower courts. Instead, this Court instructed lower courts to analyze the issue of standing "in light of the factors" set forth in its opinion. 459 U.S. at 536 n.33. These

factors are: (i) whether plaintiff's alleged injury is of the type that the antitrust laws were intended to forestall, (ii) whether plaintiff's injury was the "direct" result of the alleged antitrust violation, (iii) whether the damages alleged are speculative, (iv) whether there is a potential for duplicative recovery or complex apportionment of damages; and (v) whether there are other potential plaintiffs who are more direct victims of the alleged violation. 459 U.S. at 538-45.

Key questions were left unanswered by the decision in *Associated General Contractors*, however. The Court did not indicate whether an antitrust plaintiff must satisfy *all* the factors set forth in *Associated General Contractors* to have standing under Section 4 of the Clayton Act, or whether standing could be achieved by a plaintiff who merely satisfies *some* of these factors. Furthermore, if all of the *Associated General Contractors* factors did not have to be satisfied by a plaintiff, this Court provided little guidance as to how much weight should be given to each of the factors.

In the nine years since *Associated General Contractors*, these lingering questions have not been answered uniformly by the lower courts. Inconsistency has once again surfaced in the circuit courts' application of the test for antitrust standing.

The court of appeals below concluded that the plaintiffs had standing to sue petitioner despite the fact that plaintiffs had *not* satisfied all of the standing requirements set forth in *Associated General Contractors*. The court's decision to confer standing on the plaintiffs apparently reflects the Ninth Circuit's view that *Associated General Contractors* permits a court to find that antitrust standing exists where there are "some factors tending in favor of standing" and "some against." *See, e.g., Los Angeles Memorial Coliseum Comm'n* v. *National Football League*, 791 F.2d 1356, 1363 (9th Cir. 1986); *accord Eagle* v. *Star-Kist Foods, Inc.*, 812 F.2d 538, 543 (9th Cir. 1987).

Other circuits, however, appear to have construed the *Associated General Contractors* standing test differently. Several cases in the Fifth Circuit, for example, have ruled that antitrust standing may be denied where *one* of the *Associated General Contractors* factors is not satisfied, without any assessment of the remaining factors. *E.g.*, *Bell* v. *Dow Chem. Co.*, 847 F.2d 1179, 1183-84 (5th Cir. 1988); *Campbell* v. *Wells Fargo Bank, N.A.*, 781 F.2d 440, 443 (5th Cir.), *cert. denied*, 476 U.S. 1159 (1986). The Eleventh Circuit has gone even further, concluding that standing may be denied if "[o]ther factors not spelled out" in *Associated General Contractors* indicate that the plaintiff is "not a proper plaintiff for antitrust purposes." *Todorov* v. *DCH Healthcare Auth.*, 921 F.2d 1438, 1452 (11th Cir. 1991). The Sixth Circuit also appears to have concluded that the list of factors set forth in *Associated General Contractors* is not an "exhaustive" list. *See Pinney Dock & Transp. Co.* v. *Penn Cent. Corp.*, 838 F.2d 1445, 1462 (6th Cir.), *cert. denied*, 488 U.S. 880 (1988).

The issue of how to apply the *Associated General Contractors* standing test has been percolating in the lower courts for nine years, yet the circuits remain out of sync. This Court should definitively resolve the issue of whether all the factors enumerated in *Associated General Contractors* must be met for a plaintiff to have antitrust standing, or whether a lower court is free to determine the relative weight to assign to each factor.

2. Moreover, even if—as a general matter—each lower court may strike a balance among the *Associated General Contractors* factors, the "balance" struck by the court of appeals in this case cannot be reconciled with fundamental antitrust policies embraced by this Court in *Associated General Contractors*. While nominally reciting relevant factors set forth in *Associated General Contractors*, the court of appeals erroneously included one factor, placed undue weight on certain factors, and improperly discounted other factors.

First, the *Associated General Contractors* Court did not identify "specific intent" as one of the factors governing antitrust standing. Indeed, it made clear that an allegation that the defendant specifically intended to harm the plaintiff is "insufficient as a matter of law" to confer antitrust standing. 459 U.S. at 545. Nevertheless, the court of appeals relied upon the specific intent of the alleged conspirators to harm the plaintiffs as the first factor favoring standing in this case. App. at 15a.

Second, the court of appeals recognized that under *Associated General Contractors*, "a plaintiff who is 'neither a competitor nor a consumer' in the relevant market does not suffer 'antitrust injury.'" App. at 16a. Nevertheless, constricting this principle to an unnatural degree, the court ruled that *Associated General Contractors* favors standing for consumers in one market (*i.e.*, primary insurance sales) who sue defendants in a *different* market (*i.e.*, reinsurance sales). In effect, the court of appeals ruled that consumers always have standing because "[t]he antitrust laws are intended to preserve competition." App. at 16a. To compound this error, the court elevated this one factor above all others, stating that it had "tremendous significance." *Id.*

Third, despite the fact that the court of appeals conceded that another, more direct, class of plaintiffs (*i.e.*, primary insurers) could have sued the reinsurers, and that the alleged action of the reinsurers "took effect through the primary insurers," the court of appeals nevertheless concluded that the "directness" of the alleged injury favored standing. *Id.* at 15a. By granting standing despite its recognition that proof of damages "may be complex," and despite the fact that there exists a potential for "duplicative recovery," the court of appeals effectively discounted a critical aspect of antitrust standing analysis—namely, "the strong interest . . . in keeping the scope of complex antitrust trials within judicially manageable limits." 459 U.S. at 543.

I. THE DECISION BELOW REFLECTS THE CONTINUED CONFUSION AMONG CIRCUIT COURTS AS TO THE PROPER ANALYSIS OF ANTITRUST STANDING UNDER *ASSOCIATED GENERAL CONTRACTORS*

By its literal terms, Section 4 of the Clayton Act purports to confer standing upon "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15. Although "[o]n its face, § 4 contains little in the way of restrictive language," *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 337 (1979), this Court has refused to read the statutory language literally to allow suit by any person whose injuries "might conceivably be traced to an antitrust violation." *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 263 n.14 (1972). Rather, "despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable." *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 760 (1977) (Brennan, J., dissenting); *accord Blue Shield of Va.* v. *McCready*, 457 U.S. 465, 477 (1982).

The lower federal courts have long struggled to formulate a practical test for determining which plaintiffs should have standing to sue under the antitrust laws. By 1983, a slew of divergent doctrines had been developed for this purpose. Under the so-called "direct injury" test, standing was denied to any plaintiff whose injury was remote or consequential. *E.g.*, *Productive Inventions, Inc.* v. *Trico Prods. Corp.*, 224 F.2d 678, 679 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956). Under the "target area" test, a plaintiff had antitrust standing only if he was "within that sector of the economy" endangered by a breakdown of competition. *E.g.*, *Pan-Islamic Trade Corp.* v. *Exxon Corp.*, 632 F.2d 539, 547 (5th Cir. 1980), *cert. denied*, 454 U.S. 927 (1981). The Sixth Circuit adopted a "zone of interests" test, which required antitrust plaintiffs to prove that their injuries were

"within the zone of interests protected by" the antitrust laws. *Malamud* v. *Sinclair Oil Corp.*, 521 F.2d 1142, 1152 (6th Cir. 1975). By contrast, the Third Circuit in essence concluded that each case must be analyzed in terms of its own peculiar facts. *Cromar Co.* v. *Nuclear Materials & Equip. Corp.*, 543 F.2d 501, 506 (3d Cir. 1975).

The end result, according to one notable commentary, was a "decisional morass," lacking any "analytical framework that could make order out of the chaos." Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 Yale L.J. 809, 840 (1977). It was into this morass that this Court stepped in 1983 to try to provide such a framework, with its decision in *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983). Rejecting the existing tests that had developed within the circuits, this Court instead sought to identify the controlling factors that should be used by lower courts to circumscribe their decisions on antitrust standing. By setting forth these factors—each of which was rooted in sound antitrust policy—the Court sought to eliminate the "contradictory and inconsistent results" that were being produced under the prevailing law. *Id.* at 536 n.33.

Under the new analytical framework adopted by the Court in *Associated General Contractors*, an antitrust plaintiff could not obtain standing simply by alleging a causal connection between the antitrust violation and his injury and by further alleging that the defendant intended to cause that injury. 459 U.S. at 537. Rather, "[a] number of other factors may be controlling":

> (i) whether the plaintiff's asserted injury generally "is of the type that the antitrust statute was intended to forestall" and more particularly, whether plaintiff is a consumer or competitor in the relevant market;

(ii) whether the plaintiff's asserted injury is a direct result of the alleged restraint;

(iii) whether the plaintiff's damages claim is speculative;

(iv) whether there is a potential for complex apportionment of damages or for duplicative recovery; and

(v) whether there are other, more direct plaintiffs who might sue.

See 459 U.S. at 538-45.

The *Associated General Contractors* decision sought to replace the tangled web of contradictory standing tests used by the lower courts with an orderly, uniform framework for analysis. Yet in the nine years since the decision was handed down, it has in fact given rise to new analytical inconsistencies among lower courts.

As the Eleventh Circuit has succinctly observed, "[t]he Court's approach in *Associated General* has bred much confusion in the lower federal courts." *Todorov* v. *DCH Healthcare Auth.*, 921 F.2d 1438, 1451 n.20 (11th Cir. 1991); *see also* Comment, *The Need for An Express Test to Determine Antitrust Standing*, 1985 J. Corp. L. 123, 138 (1985) ("Continued reliance by the lower courts on broad language such as that set out in *Associated General Contractors* will perpetuate the confusion and inconsistency that plagues the antitrust standing area"). As a result, lower courts continue to reach different standing results based on substantially similar factual patterns.

The problem in large part stems from this Court's directive to lower courts in *Associated General Contractors* to analyze antitrust standing "in light of" the specific factors set forth in that opinion. 459 U.S. at 536 n.33. In handing down this directive, however, the Court left two interrelated questions unanswered:

(1) Must a plaintiff satisfy all of the *Associated General Contractors* factors, or may a lower

court confer standing on plaintiffs who only meet *some* of the factors;

(2) If all the factors need not be satisfied, is each of the *Associated General Contractors* factors to be accorded equal weight, or may a lower court decide to accord greater weight to some factors (and if so, which ones).

The court of appeals below believed that it could confer standing upon a plaintiff who did *not* satisfy all the factors set forth in *Associated General Contractors*. It expressly so stated in its conclusion that "[a]lmost all of the *Associated General Contractors* factors point to the presence of standing." App. at 16a. Moreover, with regard to the "third factor" (*i.e.*, damages), the court conceded that "the proof may be complex." *Id.* at 15a. The court also acknowledged the existence of a class of more direct plaintiffs (*i.e.*, primary insurers), although the court discounted this factor because it opined that such potential plaintiffs were "unlikely" to bring suit. *Id.* at 16a.

In proceeding under its assumption that a plaintiff could have antitrust standing without meeting all of the *Associated General Contractors* factors, the court below adopted the view that appears to prevail in the Ninth Circuit. For example, in *Los Angeles Memorial Coliseum Commission* v. *National Football League*, 791 F.2d 1356, 1363 (9th Cir. 1986), *cert. denied*, 484 U.S. 826 (1987), the court observed that "most cases will find some factors tending in favor of standing . . . and some against . . . and a court may find standing if the balance of factors so instructs." *See also Bhan* v. *NME Hosps., Inc.*, 772 F.2d 1467, 1470 n.3 (9th Cir. 1985) ("the Supreme Court did not explicitly state that a plaintiff must satisfy all of the *Associated General Contractor* factors . . ."); *R.C. Dick Geothermal Corp.* v. *Thermogenics, Inc.*, 890 F.2d 139, 146 (9th Cir. 1989) ("No single factor is decisive. The court must balance the factors. . . .").

In contrast, a number of decisions in the Fifth Circuit have come to the conclusion that failure by a plaintiff to satisfy one or more of the *Associated General Contractors* factors may constitute sufficient grounds for denying standing and may obviate the need to assess the other factors. For example, in *Bell* v. *Dow Chemical Co.*, 847 F.2d 1179, 1183-84 (5th Cir. 1988), the court affirmed the denial of antitrust standing to the plaintiff solely on the ground that its damage claim was "speculative," without attempting to balance this shortcoming against any of the other *Associated General Contractors* factors. Similarly, in *Campbell* v. *Wells Fargo Bank, N.A.*, 781 F.2d 440, 443 (5th Cir.), *cert. denied*, 476 U.S. 1159 (1986), the court denied standing to the antitrust plaintiffs on the sole ground that the plaintiffs' injuries were "not a direct consequence" of the defendant's conduct. Because of the plaintiffs' failure to satisfy this one factor, the court concluded "that there is no need to decide whether the plaintiffs' injuries are determinable and whether recovery for them would be duplicative. . . ." *Id.*[5]

If standing may be achieved despite a plaintiff's failure to satisfy all the *Associated General Contractors* factors, then a second critical issue was also left unanswered by *Associated General Contractors*—*i.e.*, should some of the factors be given greater weight than other factors. *As-*

[5] The Eleventh Circuit appears to read *Associated General Contractors* as imposing additional burdens on plaintiffs, concluding that antitrust standing might be denied to a plaintiff who meets all the *Associated General* requirements. In that circuit, "[o]ther factors not spelled out by the Supreme Court also may be relevant" to the antitrust standing decision. *Todorov* v. *DCH Healthcare Auth.*, 921 F.2d 1438, 1452 (11th Cir. 1991). "For example, a court should consider whether the plaintiff can enforce an antitrust judgment efficiently and effectively; if not, then the plaintiff may not be a proper plaintiff for antitrust purposes." *Id. See also Pinney Dock & Transp. Co.* v. *Penn Cent. Corp.*, 838 F.2d 1445, 1462 (6th Cir.), *cert. denied*, 488 U.S. 880 (1988) (the *Associated General* "list of factors is not exhaustive").

sociated General Contractors gives lower courts little guidance as to how to weigh each factor. The court of appeals below clearly did not accord each factor equal weight. Indeed, the court singled out the "fifth factor" (*i.e.*, whether plaintiffs were "competitors or consumers") as the one factor entitled to "tremendous significance." App. at 16a. The court of appeals also appeared to minimize the importance of the factor concerning the complexity of damages, and effectively to disregard the threat of duplicative recovery. *Id.* at 15a-16a.

Other circuits, in contrast, appear to accord considerably greater weight to the factors relating to damages than did the court below. *See, e.g., Pinney Dock & Transp. Co.* v. *Penn Cent.*, 838 F.2d 1445, 1463-64 (6th Cir.), *cert denied*, 488 U.S. 880 (1988) (standing denied to direct competitor of defendant on claims where damages were "extremely complex" and other direct victims existed). As previously noted, the Fifth Circuit has denied antitrust standing to plaintiffs based solely upon the fact that the damage claims were speculative. *See Bell*, 847 F.2d at 1183-84. Similarly, the D.C. Circuit has concluded that the "guiding principle" of antitrust standing analysis is "to exclude as plaintiffs those whose suits might 'undermine[] the effectiveness of treble-damages suits' "—*i.e.*, plaintiffs with damage claims that are "remote" or threaten "multiple recoveries." *Adams* v. *Pan Am. World Airways, Inc.*, 828 F.2d 24, 26 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 961 (1988) (quoting *Associated General Contractors*, 459 U.S. at 545); *cf. Associated General Contractors*, 459 U.S. at 545 n.52 ("the remote and obviously speculative character of [plaintiff's] harm is plainly sufficient to place it beyond the reach of § 4").[6]

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[6] Indeed, even before *Associated General Contractors* was decided, the Second Circuit had denied standing to a competitor of the defendant where the claim of damages was unduly speculative. *Reading Indus., Inc.* v. *Kennecott Copper Corp.*, 631 F.2d 10, 13-14 (2d Cir. 1980), *cert. denied*, 452 U.S. 916 (1981).

For the most part, circuit decisions do not make clear what weight is being accorded to each of the relevant factors in the *Associated General Contractors* list. Instead, taking to heart this Court's broad directive to analyze standing "in light of" the factors set forth in *Associated General Contractors*, lower courts have tended to engage in ad hoc assessments in which the relative importance of the individual factors is never discussed. *See, e.g.*, Taylor, *Antitrust Standing: Its Growing—Or More Accurately Its Shrinking—Dimensions*, 55 A.B.A. Antitrust L.J. 515, 526 (1986) ("the courts are not at all consistent with one another or even internally consistent within a given court as to the relative significance that should be accorded the various factors set forth in *Associated General*"). Lower courts, like the court of appeals below, appear to believe that they have great latitude to determine that a given factor is of "tremendous" significance—or of virtually no significance at all.

When this Court decided *Associated General Contractors* nine years ago, its ostensible goal was "to implement uniformity among the circuits" in the area of antitrust standing. *Southaven Land Co.* v. *Malone & Hyde, Inc.*, 715 F.2d 1079, 1085 (6th Cir. 1983). That goal has not been achieved. The decision of the court of appeals below may be reflective of the approach that the Ninth Circuit has taken concerning antitrust analysis, but it does not reflect a uniform approach among lower courts. Like the court of appeals below, courts today exercise virtually unfettered discretion in weighing and discounting the factors governing antitrust standing analysis—as well as importing other factors that might be relevant to the issue.

This Court has waited long enough for the circuits to come to a consensus on the key issues left open by *Associated General Contractors*. Certiorari should be granted to determine whether the approach to antitrust standing used by the court below is the correct one.

II. THE COURT OF APPEALS' STANDING ANALYSIS IS INCONSISTENT WITH ANTITRUST POLICIES UNDERLYING THE *ASSOCIATED GENERAL CONTRACTORS* ANALYSIS

Even if there were complete uniformity in lower courts' interpretation of *Associated General Contractors*, the decision below should nevertheless be reviewed because the court of appeals' application of the so-called "five factors set out in *Associated General Contractors*" is inconsistent with fundamental antitrust policies that served as the foundation for *Associated General Contractors*. If allowed to stand, the court of appeals' decision will encourage lower courts to pay lip service to the factors governing standing under Section 4 of the Clayton Act,[7] while actually frustrating the policy goals that these factors are meant to serve.

a. *Intent.* According to the court of appeals, the first factor that "favors standing" is the claim that the "reinsurer defendants are alleged to have intended to restrict the kinds of insurance available to the plaintiffs." App. at 15a. Yet *Associated General Contractors* confirmed that "[t]he availability of the § 4 remedy . . . is not a question of the specific intent of the conspirators." *Associated General Contractors*, 459 U.S. at 537 (quoting *Blue Shield of Va.* v. *McCready*, 457 U.S. 465, 479 (1982)). Indeed, in *Associated General Contractors*, this Court ruled that "an allegation of intent to harm the [plaintiff]" is "insufficient as a matter of law" to sustain a finding of antitrust standing, even when combined with a claim of consequential harm resulting from a violation of the antitrust laws. 459 U.S. at 545; *see also Adams* v.

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[7] Plaintiffs also seek injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. § 26. As this Court made clear in *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104, 109-13 & n.6 (1986), the standing analysis under Section 16 of the Clayton Act will largely coincide with the analysis under Section 4 of the Clayton Act, with the exception of those factors relating to damage calculations.

Pan Am. World Airways, Inc., 828 F.2d 24, 26 n.4 (D.C. Cir. 1987) *cert. denied*, 485 U.S. 961 (1988) (rejecting argument that "the defendant's specific intent to injure plaintiff is also a factor in the proper-plaintiff analysis").

No sound antitrust policy is furthered by allowing the treble damage remedy under Section 4 of the Clayton Act to hinge upon the vagaries of claims of intent and motivation. As this Court has repeatedly observed, the treble damage remedy was meant to vindicate the public's interest in antitrust enforcement. The availability of a remedy under Section 4 of the Clayton Act should be determined by *public* policies, such as whether a suit will promote or undermine the effectiveness of the treble damages remedy. The availability of a Section 4 remedy should not depend upon whether the alleged injury to the plaintiff was "intended." By making "intent" an express factor in antitrust standing analysis, the court of appeals has strayed from the antitrust policies underlying *Associated General Contractors*.

b. *Directness of the Injury.* The reinsurer defendants, including petitioner Winterthur, did not sell insurance to plaintiffs. As the plaintiffs themselves alleged, reinsurers sell reinsurance *only* to other insurance companies. *E.g.*, Cal. Cmplt., ¶ 26; Conn. Cmplt., ¶ 4(p).

Plaintiffs alleged that petitioner and other domestic reinsurers conspired with certain other defendants "to restrict the terms on which *reinsurance* would be offered for CGL risks and to refuse to provide *reinsurance* coverage for CGL risks." App. at 12a (emphasis added). In short, plaintiffs allegedly suffered an *indirect* injury caused by the reinsurers' refusal to offer reinsurance to primary insurers. By their own allegations, plaintiffs were not injured by the alleged refusal of reinsurers to offer reinsurance to primary insurers; plaintiffs' claim is that they were injured by the actions that primary insurers took *in response to* the alleged boycott by reinsurers. It strains credulity to characterize plaintiffs' al-

leged harm in the *primary insurance* market as the direct result of the reinsurers' alleged boycott in the *reinsurance* market.

The court of appeals recognized that "the action of the reinsurers took effect through the primary insurers. . . ." App. at 15a. Yet the court nevertheless concluded that the "injury alleged was direct." *Id.* This conclusion cannot be reconciled with *Associated General Contractors.* In *Associated General Contractors*, this Court ruled that a labor union suffered an "indirect" injury when the defendants coerced certain contractors not to do business with unionized firms. Similarly, any injury suffered by plaintiffs here was the result of the conduct of the primary insurers who were allegedly coerced by the reinsurers. To call such injury "direct" is tantamount to deleting this factor from the *Associated General Contractors* calculus.[8]

c. *Character of the Damages.* As noted in *Associated General Contractors*, this Court has a "strong interest . . . in keeping the scope of complex antitrust trials within judicially manageable limits." 459 U.S. at 543.

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[8] The indirect nature of the injury allegedly caused by Winterthur and other domestic reinsurers is not changed by the fact that plaintiffs alleged that defendant primary insurers joined in the conspiracy with the domestic reinsurers. The reinsurers are alleged to have refused to offer reinsurance to non-defendant primary insurers who utilized the objectionable ISO forms. The alleged participation by defendant primary insurers (*i.e.*, as inducers of this boycott in the reinsurance market) does not alter the fact that any effects in the primary insurance market (where plaintiffs are consumers) were indirect, as described above. Similarly, the indirect nature of plaintiffs' injury is not cured by the fact that the "second wave" complaints include one count alleging a "general" conspiracy (which attempts to merge all the alleged conspiracies into one and which includes all defendants). This "general" conspiracy count, like the other counts, is based on factual allegations that the defendant reinsurers refused to offer *reinsurance* to the primary insurers, in the *reinsurance* market. Here, too, any injury to plaintiffs was the indirect result of the reinsurers' alleged refusal to offer reinsurance to primary insurers.

Thus, in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), this Court held that indirect purchasers could not sue under Section 4 of the Clayton Act to recover damages for price overcharges that had been passed on to them by their suppliers (who purchased directly from the price-fixing conspirators). Cases like *Illinois Brick* have "stressed the importance of avoiding either the risk of duplicative recoveries on the one hand, or the danger of complex apportionment of damages on the other." *Associated General Contractors*, 459 U.S. at 543-44. A claim for damage that is "remote" and "speculative" is "plainly sufficient to place it beyond the reach of § 4." *Id.* at 545 n.52.

The court of appeals below gave short shrift to the problems posed by complex theories of damages. While acknowledging that "the proof [of damages] may be complex," the court effectively discounted the importance of damage complexity and judicial manageability in the antitrust standing analysis. Yet in fact, the problems posed by complex damages proof in this case may be even more formidable than the problems in *Illinois Brick*. Because different insurance and reinsurance contracts are used at each market level, there is not even a "chain of distribution" through which a single "product" makes its way from reinsurers to plaintiffs. Any attempt by plaintiffs to prove that they were injured by conspiracies affecting reinsurance sales will require the fact finder to unravel the impact of decisions made by scores of independent, primary insurers to obtain (or forgo) reinsurance. Tracing and apportioning plaintiffs' damage claims in this context will likely pose obstacles comparable to those that resulted in dismissal of plaintiffs' claims in *Illinois Brick*.[9]

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[9] The court of appeals appeared to discount totally the risk of duplicative recovery with regard to those "claims in which the primary insurers are charged together with the reinsurers," because "all of the defendants would be jointly and severally liable if the charges are true." App. at 15a-16a. This reasoning cannot with-

d. *Existence of Other, More Appropriate Plaintiffs.* The court of appeals conceded that "[t]he primary insurers who were denied reinsurance could have brought suit." App. at 16a. Yet under *Associated General Contractors*, "[t]he existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement" weighs heavily against allowing more remote parties to bring suit. 459 U.S. at 542. The court of appeals discounted the possibility that these direct victims might sue, speculating that because the primary insurers in ISO "caved in" to the alleged coercion of the reinsurers, primary insurers are "unlikely" to bring suit. App. at 16a.

Such speculation is difficult to reconcile with the analysis of this Court in *Associated General Contractors*. In *Associated General Contractors*, this Court concluded that the "immediate victims of coercion by defendants" could sue the defendants, and therefore the indirect victims had no standing. 459 U.S. at 541. The fact that no direct victims had actually filed suit in *Associated General Contractors* did not lead this Court to conclude that they were intimidated, as the court of appeals concluded here. Instead, this Court concluded that the lack of suits by direct victims "shed doubt on the proposition that these 'victims' were actually harmed at all." *Id.* at 542 n.47. Primary insurers, it should be remembered, include many large and powerful companies. If a lower court is free to speculate that direct victims like these are too intimidated to protect their rights in court, then lower courts will be free to confer standing upon any indirect victim, simply by speculating that direct victims are unlikely to sue.

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stand analysis. There are well over a thousand primary insurers nationwide, and only four of these primary insurers were named as defendants. Winterthur faces a risk of duplicative recovery if a non-defendant primary insurer were to file suit based on the same conduct challenged by plaintiffs below.

e. *The Nature of Plaintiffs' Claimed Injury.* Finally, addressing the factor which it deemed to be of "tremendous significance," the court of appeals observed that a "plaintiff who is 'neither a competitor nor a consumer' in the relevant market does not suffer 'antitrust injury.'" App. at 16a. However, the court went on to conclude that "plaintiffs were consumers of CGL insurance" and that "as consumers [they] have alleged antitrust injury." *Id.*

In coming to this conclusion, the court stretched the boundaries of the consumer/competitor category well beyond its intended scope. By plaintiffs' own allegations, plaintiffs were not consumers in the relevant market—*i.e.*, the market for sales of reinsurance to other insurance companies. There are no factual allegations of anticompetitive conduct by the reinsurer defendants in the relevant market where plaintiffs are consumers—*i.e.*, the primary insurance market. In short, while plaintiffs were indeed "consumers," they were *not* consumers in the reinsurance market, where petitioner (and other reinsurers) allegedly engaged in unlawful conduct.

As this Court has noted in other contexts, "an antitrust policy divorced from market considerations would lack any objective benchmarks." *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 53 n.21 (1977). The court of appeals' application of this factor similarly lacks any benchmark, because every plaintiff can be characterized as a "consumer" or a "competitor." The relevant issue, however, should be whether the plaintiff is a consumer or competitor *in the market where the defendants allegedly acted unlawfully. Cf. Exhibitors' Serv., Inc.* v. *American Multi-Cinema, Inc.*, 788 F.2d 574, 579 (9th Cir. 1986) ("While it is true that the two firms compete, the requirement laid down in *Associated General Contractors* is that the plaintiffs and conspirators compete in the 'market in which trade was *restrained*'") (quoting 459 U.S. at 539) (emphasis in original); *De Atucha* v. *Commodity Exch., Inc.*, 608 F.

Supp. 510, 517-18 (S.D.N.Y. 1985) (silver futures customer in London silver market lacked antitrust standing to sue alleged manipulators of silver futures in United States market). Petitioner is alleged only to have refused to sell in the reinsurance market; no plaintiff was a consumer in *that* market.

It should not be enough for a lower court to simply identify the factors set forth in *Associated General Contractors* and then proceed to "apply" those factors without due regard for the antitrust policies they were meant to advance. Yet that is what the court of appeals has done in this case. The decision below should be reviewed to ensure that the factors governing the critically important issue of antitrust standing are being properly applied in the lower courts.

III. THIS PETITION SHOULD ALSO BE GRANTED TO RESOLVE THE QUESTIONS PRESENTED HEREIN RELATING TO WHETHER THE CONDUCT ALLEGED IS EXEMPT FROM THE ANTITRUST LAWS

With regard to Questions 3, 4, and 5 stated under "Questions Presented," *supra* at (i), Winterthur adopts and incorporates by reference the arguments included in the Petition for a Writ of Certiorari filed in this case by Hartford Fire Insurance Co., *et al.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 89-16405, 89-16513 to 89-16531

IN RE INSURANCE ANTITRUST LITIGATION

ACE CHECK CASHING, INC.; ACME CORRUGATED BOX COMPANY, INC.; ANASTASIOS MARKOS, t/a MUNICIPAL EXXON; BAY HARBOR PARK HOMEOWNER'S ASSOCIATION, INC.; BENSALEM TOWNSHIP AUTHORITY; BIG D BUILDING SUPPLY CORPORATION, *et al.*,

Private Plaintiffs,
Plaintiffs-Appellants,

and

STATE OF ALABAMA, *et al.*,

Plaintiffs,

v.

AETNA CASUALTY AND SURETY COMPANY; ALLSTATE INSURANCE COMPANY; CIGNA CORP.; HARTFORD FIRE INSURANCE COMPANY, *et al.*,

Defendants-Appellees.

STATE OF CALIFORNIA; CITY OF LAFAYETTE; CITY AND COUNTY OF SAN FRANCISCO; COUNTY OF SAN BENITO,

Plaintiffs-Appellants,

and

STATE OF ALABAMA, *et al.*,

Plaintiffs,

v.

AETNA CASUALTY AND SURETY COMPANY; ALLSTATE INSURANCE COMPANY; CIGNA CORP.; HARTFORD FIRE INSURANCE COMPANY, *et al.*,

Defendants-Appellees.

STATE OF CALIFORNIA; CITY OF LAFAYETTE; CITY AND COUNTY OF SAN FRANCISCO; COUNTY OF SAN BENITO,
Plaintiffs-Appellants,

v.

INSURANCE SERVICES OFFICE, INC., CNA RE (U.K.) LTD.; CONTINENTAL REINSURANCE CORPORATION; UNION-AMERICA INSURANCE CO.; EDWARDS & PAYNE LTD.; EXCESS INSURANCE CO., LTD.; GENERAL REINSURANCE CORP.; THOMAS A. GREENE & COMPANY, INC.; KEMPER REINSURANCE LONDON; LLOYD'S UNDERWRITERS & BROKERS; MERCANTILE & GENERAL REINSURANCE COMPANY OF AMERICA; NORTH AMERICAN REINSURANCE CORPORATION; OXFORD SYNDICATE MGMT. LTD.; (sued herein as K.F. ADLER & OTHERS (U.A.) LTD.); PRUDENTIAL REINSURANCE; REINSURANCE ASSOCIATION OF AMERICA; TERRA NOVA INSURANCE CO.; AETNA CASUALTY AND SURETY COMPANY; ALLSTATE INSURANCE COMPANY; WINTERTHUR REINSURANCE CORPORATION OF AMERICA; CIGNA CORP.; HARTFORD FIRE INSURANCE COMPANY,
Defendants-Appellees.

STATE OF NEW YORK; ROOSEVELT ISLAND OPERATING AUTHORITY; VILLAGE OF GROTON; VILLAGE OF LAKE SUCCESS,
Plaintiffs-Appellants,

v.

HARTFORD FIRE INSURANCE COMPANY; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; ALLSTATE INSURANCE; *et al.*,
Defendants-Appellees.

COMMONWEALTH OF MASSACHUSETTS; TOWN OF HANOVER; TOWN OF MILFORD,
Plaintiffs-Appellants,

v.

HARTFORD FIRE INSURANCE COMPANY; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; ALLSTATE INSURANCE; *et al.*,
Defendants-Appellees.

STATE OF MINNESOTA,
Plaintiff-Appellant,

v.

HARTFORD FIRE INSURANCE COMPANY; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; ALLSTATE INSURANCE; *et al.*,
Defendants-Appellees.

STATE OF WEST VIRGINIA; CITY OF CLAY; COUNTY OF HANCOCK; COUNTY OF MINERAL; COUNTY OF WIRT,
Plaintiffs-Appellants,

v.

HARTFORD FIRE INSURANCE COMPANY; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; ALLSTATE INSURANCE; *et al.*,
Defendants-Appellees.

STATE OF WISCONSIN,
Plaintiff-Appellant,

v.

HARTFORD FIRE INSURANCE COMPANY; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; ALLSTATE INSURANCE; *et al.*,
Defendants-Appellees.

CITY OF MOBILE; STATE OF ALABAMA;
CITY OF BIRMINGHAM,
Plaintiffs-Appellants,

v.

AETNA CASUALTY AND SURETY COMPANY; WINTERTHUR REINSURANCE CORPORATION OF AMERICA; CIGNA CORP.; HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE,
Defendants-Appellees.

STATE OF ARIZONA,
Plaintiff-Appellant,

v.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,
Defendants-Appellees.

STATE OF MARYLAND,
Plaintiff-Appellant,

v.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,
Defendants-Appellees.

STATE OF WASHINGTON; COUNTY OF COWLITZ,
Plaintiffs-Appellants,

v.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,

Defendants-Appellees.

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,

Defendants-Appellees.

STATE OF COLORADO,

Plaintiff-Appellant,

v.

WINTERTHUR REINSURANCE CORPORATION OF AMERICA; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE,

Defendants-Appellees.

STATE OF OHIO; TOWNSHIP OF JACKSON; COUNTY OF HARDIN,

Plaintiffs-Appellants,

v.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,

Defendants-Appellees.

STATE OF CONNECTICUT,
Plaintiff-Appellant,

v.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,
Defendants-Appellees.

COMMONWEALTH OF PENNSYLVANIA; COUNTY OF SCHUYLKILL; CITY OF ALTOONA; CITY OF YORK; BOROUGH OF CHAMBERSBURG,
Plaintiffs-Appellants,

v.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,
Defendants-Appellees.

STATE OF ALASKA,
Plaintiff-Appellant,

v.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,
Defendants-Appellees.

STATE OF MONTANA; COUNTY OF TETON,
Plaintiffs-Appellants,

v.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,

Defendants-Appellees.

STATE OF MICHIGAN,

Plaintiff-Appellant,

v.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,

Defendants-Appellees.

STATE OF LOUISIANA, CITIES OF BATON ROUGE, NEW ORLEANS, SLIDELL, NACHITOCHES AND EUNICE,

Plaintiffs-Appellants,

v.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California

Argued and Submitted March 15, 1991

Decided June 18, 1991

Before BEEZER and NOONAN, Circuit Judges, and SINGLETON,* District Judge.

NOONAN, Circuit Judge:

Nineteen states and numerous private parties brought antitrust suits against the defendants named above. These suits were consolidated in the district court and were ultimately dismissed. The plaintiffs appeal. We reverse the district court and remand.

FACTUAL BACKGROUND

The undisputed facts are set out by the district court in *In re Insurance Antitrust Litigation*, 728 F.Supp. 464, 468-70 (N.D. Cal. 1989). We summarize:

Commercial general liability insurance (CGL) protects the insured against the risk of liability to third parties for bodily injury or property damage. It is purchased by businesses, nonprofit entities, and governmental units. Defendants Hartford Fire Insurance Company (Hartford), Allstate Insurance Company (Allstate), Aetna Casualty and Surety Company (Aetna), and CIGNA Corporation (CIGNA) are sellers of CGL.

In distinction from these primary insurers, there are reinsurers to whom the primary insurers turn to share the risk. The terms and availability of reinsurance directly affect the terms and availability of primary insurance. In turn, retrocessional insurance—insurance for reinsurers—has an impact on the terms of reinsurance and primary insurance. The defendant reinsurers in this case are domestic—*e.g.*, General Reinsurance Corporation (General Re)—and also foreign. The foreign defendant companies include one Swiss corporation, Winterthur Swiss Insurance Company (Winterthur); and six "London Company Market" corporations, all of them subsidi-

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* The Honorable James K. Singleton, United States District Judge for the District of Alaska, sitting by designation.

aries of American corporations: Terra Nova Insurance Co., Ltd. (Terra Nova); Unionamerica Insurance Co., Ltd. (Unionamerica); Continental Reinsurance Co., (U.K.) Ltd. (Continental Re); Excess Insurance Group, Ltd. (Excess); Kemper Reinsurance London, Ltd. (Kemper Re); and CNA Re (U.K.) Ltd.

Reinsurance is arranged by specialized brokers and underwriters. Much reinsurance is done by syndicates doing business through Lloyd's of London. A variety of defendants here are underwriters for these reinsurance syndicates—*e.g.*, Merrett Underwriting Agencies Management, Ltd. (Merrett) and Three Quays Underwriting Management Ltd. (Three Quays). Thomas A. Greene and Co., Inc. (Greene) is an American reinsurance broker, a defendant here. Ballantyne, McKean and Sullivan, Ltd. (Ballantyne) and R. K. Carvill & Co., Ltd., (Carvill) are London reinsurance brokers, defendants here. There are also individual defendants associated with reinsurance—*e.g.*, Peter North Miller, the chairman of the Council of Lloyd's, its governing body; and Robin A. G. Jackson, chief underwriter for Merrett.

Two insurance associations are also defendants. One is Reinsurance Association of America (RAA), which principally engages in lobbying. The other is the Insurance Service Office (ISO). ISO has a key role in the regulation of insurance by the several states. Formed in 1971 by the merger of eleven insurance rating bureaus, ISO is an association of over fourteen hundred property and casualty insurers. It develops standard forms of policies. It collects statistical data and estimates risks relevant to the forms. In those states where regulators formally approve the forms, ISO presents the forms for approval.

In 1984, Hartford expressed its dissatisfaction with the standard ISO form for CGL insurance. In particular, Hartford was displeased with the way the form insured against "occurrences" of liability during the life of the policy. Such insurance had "a long tail," *i.e.*, years after

the policy had expired, a claim might be made upon it for an occurrence during the life of the policy. Hartford wanted a "claims made" form to replace the "occurrences" form. Under a "claims made" form only claims made during the life of the policy would be paid. Hartford also objected to coverage of liability for accidental pollution in the standard CGL form.

Led by Hartford, the defendant primary insurers exerted concerted pressure on ISO to get it to withdraw its form for CGL insurance. In June 1984 Hartford persuaded major American reinsurers to agree to boycott the ISO form. Hartford, Aetna, Allstate and CIGNA then joined forces to persuade key underwriters at Lloyd's to agree to boycott the form. The defendants used reinsurance brokers to convey their message. Leading underwriters in London responded to the American request by threatening a boycott of insurance written on the form. ISO began to retreat. In September 1984 ISO agreed to the unprecedented presence of domestic and foreign reinsurers at its executive committee meeting of September 20, 1984. Four reinsurance underwriters from Lloyd's conveyed their insistence on Hartford's terms. Change the form or get no reinsurance was their theme. ISO responded by eliminating accidental pollution coverage and by approving a claims made form with a date after which claims could not be filed. ISO also continued to offer a CGL occurrence form.

The reinsurance defendants continued to press for elimination of the occurrence form. They announced, publicly and privately, that there would be no reinsurance for primary insurers writing on the occurrence form, and they refused to renew long-standing reinsurance treaties with primary insurers in the United States unless they agreed to abandon the occurrence form. As a result of the reinsurers' actions, primary insurers were precluded from selling long tail insurance and also from selling accidental pollution insurance. Whether these varieties of insurance disappeared entirely is not clear; what is alleged is that

their availability was substantially diminished. In most states where a regulatory state agency approved insurance forms, ISO obtained approval of its new CGL form. Thereafter, ISO withdrew its data collection and risk-estimation support for the pre-1984 form.

In late 1985 Hartford and Aetna took the lead in urging ISO to develop standard forms for two other types of CGL insurance: umbrella and excess. With the cooperation of Merrett, Three Quays and Allstate, these standard forms were prepared and approved by ISO.

London reinsurers including Unionamerica, Terra Nova, Excess, Kemper Re and Continental Re, plus the Lloyd's underwriters Merrett and Edwards and Payne agreed to boycott reinsurance and insurance policies for United States property seepage and pollution exposures. The agreement is memorialized in the "Non Marine London Market Agreement 1987," signed by over forty retrocessional reinsurers at Lloyd's and the London Company Market. The parties to the agreement agreed to accept retrocessional reinsurance only from reinsurers who signed a letter of intent stating the following:

> We hereby agree that we will use our best endeavours to ensure that all U.S.A. and Canadian exposed insurance/reinsurance business attaching on or after 1st January 1987 will only be written where the original business includes a seepage and pollution exclusion clause wherever legal and applicable.

The effect of this agreement was to deny insurance consumers in the United States property coverage for seepage and pollution.

The Markets

As the plaintiffs have presented their case, the markets affected by the defendants' conduct are (1) the market in the United States for CGL insurance, (2) the market in the United States for excess and umbrella CGL insurance,

(3) the market in the United States for property insurance, (4) the market in the United States and the United Kingdom for reinsurance, and (5) the market in the United Kingdom for retrocessional insurance.

The Suits

The complaint filed by California is representative of the claims of Alabama, Arizona, California, Massachusetts, New York, West Virginia, and Wisconsin. In its first claim, California alleges that the American reinsurer defendants; the four primary insurer defendants; Winterthur; and Greene conspired in violation of section 1 of the Sherman Act, 15 U.S.C. § 1, to restrict the terms on which reinsurance would be offered for CGL risks and to refuse to provide reinsurance coverage for CGL risks unless ISO agreed to amend its 1984 CGL forms. In its second claim, California alleges that named Lloyd's underwriters; the four primary insurer defendants; and the brokers Greene and Carvill conspired to the same effect. In the third claim, California alleges that the Lloyd's underwriters; the four primary insurers; the American reinsurers; Winterthur; and Greene and Carvill conspired to the same effect.

In its fourth claim, California includes as defendants RAA and ISO together with the primary insurers; the Lloyd's underwriters; the American reinsurers; Winterthur; and Greene and Carvill. California charges them with conspiracy to eliminate pollution coverage and retroactive coverage from the 1984 claims-made form of ISO.

California's fifth claim is against five named Lloyd's underwriters; against Peter Miller and Robin A. G. Jackson; and against the London reinsurance broker Ballantyne, charging them with violation of section 1 of the Sherman Act by conspiracy to restrict the terms on which reinsurance would be provided for CGL risks; to refuse to reinsure CGL risks written on an occurrence form; and to eliminate reinsurance on long-tail risk covered by occurrence policies.

The sixth claim for relief names the Lloyd's underwriters; London company reinsurers, Unionamerica, Terra Nova, and CNA Re; and London reinsurance broker Ballantyne as conspirators to violate the Sherman Act by restricting the terms on which CGL reinsurance would be provided and by limiting the availability in the United States of pollution coverage.

In the seventh claim California charges ISO; Aetna, Allstate and Hartford; and the underwriters Merrett and Three Quays with violating the Sherman Act by agreeing to, and promulgating, model forms for umbrella and excess insurance.

The eighth claim of California is that the six named London Company reinsurers plus Merrett conspired to restrict the terms on which property insurance and reinsurance coverage would be provided for North American risks.

The ninth to eleventh claims of California are for violations of state law—of, respectively, the Cartwright Act, California Business and Professional Code, § 16720 et seq.; the Unfair Trade Practices Act, California Insurance Code, § 790 et seq.; and the Unfair Competition Act, California Business and Professions Code § 17200 et seq. No defendants are named in these claims but it is asserted that all of the conspiracies federally charged violated the three state laws invoked here.

The complaint of Connecticut is representative of complaints filed after the California complaint by Alaska, Colorado, Connecticut, Louisiana, Maryland, Michigan, Minnesota, Montana, New Jersey, Ohio, Pennsylvania, and Washington. There is substantial overlap between the California and Connecticut complaints. Connecticut, however, in its first claim charges all of the defendants with violation of section 1 of the Sherman Act "by a conspiracy with the purpose and with the effect of shrinking the scope of CGL property/casualty insurance and reinsur-

ance and retrocessional reinsurance in connection therewith."

PROCEEDINGS

In March 1988 eight plaintiff states filed California-style complaints. In June 1988 ten additional states filed Connecticut-style complaints. Louisiana later joined this group, and Minnesota amended its complaint to conform to the Connecticut style. Various private plaintiffs joined in; all but two—from Illinois and Florida—were from states that were already plaintiffs.

The defendants filed five motions asking the district court to dismiss the suits for failure to state a cause of action or, in the alternative, to grant summary judgment. On October 10, 1989 the district court gave judgment for the defendants for reasons that will be taken up *infra*. Doing so, the district court treated its action as dismissal for failure to state a cause of action or, in the alternative, as summary judgment for the defendants. The district court accepted all the facts alleged by the plaintiffs and stated that there were "no factual disputes material to this ruling." *In re Insurance Antitrust Litigation*, 723 F.Supp. at 491.

Thereafter the plaintiffs moved to amend, and the district court denied the motion, observing: "The plain fact is that plaintiffs seek to recover on a theory that, as heretofore explained at length, will not stand under the law." *Id.* at 490.

The plaintiffs appeal.

ANALYSIS

Standing

The domestic and foreign reinsurers challenged the plaintiffs' standing to bring an antitrust suit against them. The district court ruled in the plaintiffs' favor. *In re Insurance Antitrust Litigation*, 723 F.Supp. at

482-83. The foreign reinsurer defendants press their position on this appeal.

Standing in the sense challenged depends on whether Congress in the Sherman Act intended to protect the kind of interest asserted by the plaintiffs. *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 146 (9th Cir.1989). To answer this question we look at the five factors set out in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 537-45, 103 S.Ct. 897, 908-12, 74 L.Ed.2d 723 (1983).

First: The Specific Intent of the Alleged Conspirators. The reinsurer defendants are alleged to have intended to restrict the kinds of insurance available to the plaintiffs. This factor favors standing.

Second: The Directness of the Injury. "Directness" in the antitrust context means "close in the chain of causation." *R.C. Dick*, 890 F.2d at 147. Accepting as we must the plaintiffs' allegations as true, there is a close connection between the conduct of the reinsurer defendants, domestic and foreign, and the damages suffered by the plaintiffs. As the district court found, "the direct effect" of the reinsurers' action was "to restrain the availability of desired coverages in the markets in which plaintiffs purchase insurance." *In re Insurance Antitrust Litigation*, 723 F.Supp. at 483. That the action of the reinsurers took effect through the primary insurers does not lessen the directness of these consequences which followed so closely upon the challenged conduct. The injury alleged was direct. This factor favors standing.

Third: The Character of the Damages. According to their claims, plaintiffs suffered by having to pay more for the insurance they wanted. Although the proof may be complex, it would appear that they could prove how much extra they had to pay. In the claims in which the primary insurers are charged together with the reinsurers, all of the defendants would be jointly and sever-

ally liable if the charges are true. In the claims in which the reinsurers alone are defendants, there will be a problem of allocating the damages caused by the reinsurers as distinct from the damages caused by the primary insurers, and there is a danger of duplicative recovery. To the extent of this problem and this damage, the character of the damages is against standing; but the net balance as to damages is in favor of standing.

Fourth: The Existence of Other, More Appropriate Plaintiffs. The primary insurers who were denied reinsurance could have brought suit. The theoretical possibility that such entities could have sued must be discounted by the power the allegations attribute to the London reinsurers. The 1400 members of ISO could not withstand this power. As they caved in to it, they are unlikely to desire to challenge it in court. Consumers of insurance are not subject to this restraint. Realistically, no more appropriate class of plaintiffs exists.

Fifth: The Nature of the Plaintiffs' Claimed Injury. The fifth factor is "of tremendous significance." *R.C. Dick*, 890 F.2d at 148, quoting *Bhan v. NME Hospitals, Inc.*, 772 F.2d 1467, 1470 n. 3 (9th Cir.1985). For example, a plaintiff who is "neither a competitor nor a consumer" in the relevant market does not suffer "antitrust injury." *R.C. Dick* at 148.

In contrast, plaintiffs here were consumers of CGL insurance. As consumers, they participated in the market said to have been restrained. The antitrust laws are intended to preserve competition. They are intended to preserve competition for the benefit of consumers in the market in which competition occurs. When competition is choked off, it is the consumers who suffer. The plaintiffs here as consumers have alleged antitrust injury.

The Balance. Almost all of the *Associated General Contractors* factors point to the presence of standing against all of the defendants. By not challenging the plaintiffs'

standing on this appeal, the defendant primary insurers and the domestic reinsurers concede the presence of the factors that establish standing. The foreign reinsurers have no characteristics that distinguish them from the domestic reinsurers. As the district court determined, the plaintiffs have standing to maintain this antitrust suit against all defendants.

Standing as Parens Patriae

That a state as *parens patriae* may sue to redress a violation of the antitrust laws is well-established. *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 450-51, 65 S.Ct. 716, 722-23, 89 L.Ed. 1051 (1945) (conspiracy in violation of antitrust laws is a wrong "of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected.") There must, of course, be antitrust injury for an injunction to be granted. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 109-16, 107 S.Ct. 484, 488-92, 93 L.Ed.2d 427 (1986). Each state here asserts its "quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general." *Alfred L. Snapp & Sons, Inc. v. Puerto Rico*, 458 U.S. 592, 607, 102 S.Ct. 3260, 3269, 73 L.Ed.2d 995 (1982). That interest makes each state "more than a nominal party." *Id.* The state's interest in preventing harm to its citizens by antitrust violations is, indeed, a prime instance of the interest that the *parens patriae* can vindicate by obtaining damages and/or an injunction. *Id.* at 605, 102 S.Ct. at 3268.

The McCarran-Ferguson Act Defense

The district court dismissed the claims of the plaintiffs because of the McCarran-Ferguson Act immunity of the defendants. We look at the plaintiffs' allegations, accepting them as the district court did as true, to see if McCarran immunity is present.

The McCarran-Ferguson Act provides that no act of Congress "shall be construed to invalidate" any state

law enacted "for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b) (1988). Two relevant exceptions are added: The Sherman Act "shall be applicable to the business of insurance to the extent that such business is not regulated by the State law." *Id.* Moreover, "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." *Id.* § 1013(b).

For the immunity to apply, therefore, the defendants must be in the business of insurance; that business must be regulated by state law; and the defendants must not have agreed to boycott, coerce, or intimidate or performed an act of boycott, coercion or intimidation.

The Business of Insurance

The district court correctly found that the first condition was met: the defendants are in the business of insurance. Reinsurance and retrocessional insurance are as much the business of insurance as the offering of primary insurance. *In re Insurance Antitrust Litigation*, 723 F.Supp. at 473. Although the plaintiffs made an issue of this question in the district court, they do not seriously argue it on this appeal.

State Regulation

Do the states regulate the conduct complained of here? The district court observed that the complaints filed by the states alleged violation of state law as well as violation of the Sherman Act. The district court concluded that these allegations were "self-defeating." *Id.* at 475. The states had wounded their case mortally by asserting that the defendants were liable to state regulation.

By the same token, it could be observed, the defendants by their McCarran-Ferguson Act defense conceded that their business was subject to regulation by the states, and

the foreign defendants thereby undermined their claim that comity barred their being subject to American regulation. The district court recognized that the position of the foreign defendants was inconsistent but did not feel bound to resolve the inconsistency, treating the defendants' pleas as alternatives: they won either because they were subject to state regulation or, because of comity, they were subject to no American regulation. *Id.* at 479.

What is sauce for the goose is sauce for the gander. If defendants are to be read as offering inconsistent alternatives, so are the plaintiffs to be read. Pleading of one alternative does not destroy the foundation of the other alternative. Neither side is trapped by its pleadings.

More fundamentally, established law blocks regulation by one state of the United States of the insurance business outside the borders of that state. A state's regulation of insurance does not have extraterritorial effect within the United States. *See FTC v. Travelers Health Ass'n*, 362 U.S. 293, 298-99, 302, 80 S.Ct. 717, 720-21, 722, 4 L.Ed.2d 724 (1960). The court commented on the legislative history of the McCarran-Ferguson Act and concluded from H.R.Rep. 143, 79 Cong. 1st Sess. 3, which cited *Allgeyer v. Louisiana*, 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832; *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346, 43 S.Ct. 125, 67 L.Ed. 297; and *Connecticut General Insurance Co. v. Johnson*, 303 U.S. 77, 58 S.Ct. 436, 82 L.Ed. 673 that a state does not have power to regulate in any way contracts of insurance or reinsurance entered into outside its jurisdiction even though the risks covered were risks within the state. *Id.* 362 U.S. at 300-01, 80 S.Ct. at 721-22. The Court summed up the legislative history: "There was no indication of any thought that a State could regulate activities carried on beyond its own borders." *Id.* at 300, 80 S.Ct. at 721.

A fortiori, regulation by the fifty states of foreign reinsurers is beyond the jurisdiction of the states. J. At-

wood and K. Brewster, *Antitrust and American Business Abroad* (2d ed. 1981) 1, 78. All of the arguments eloquently put by the London defendants in their objection to the application of the Sherman Act to their business apply fifty times over to the regulation of it by the individual states. State insurance schemes "do not, and could not, purport to regulate the bulk of international insurance transactions." *Id.* Consequently, McCarran-Ferguson Act immunity does not attach to the foreign defendants. By the same token, the claims by the states against the foreign defendants alone under state insurance laws (referencing the fifth, sixth, and eighth California claims) must be dismissed as seeking to exercise extraterritorial jurisdiction.

A different question is presented by the primary insurers, the American reinsurers, and the American insurance brokers, all of whom are subject to regulation by the states and therefore prima facie immune. The question is whether the action of these domestic defendants in combination with the foreign defendants is subject to state regulation. The states argue that it is not. They invoke the principle that "an exempt entity forfeits antitrust exemption by acting in concert with nonexempt parties." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231, 99 S.Ct. 1067, 1083, 59 L.Ed.2d 261 (1979). Membership of an exempt entity in a conspiracy with nonexempt entities makes the exempt entity liable. *Beltz Travel Service, Inc. v. International Air Transport Assoc.*, 620 F.2d 1360, 1366-67 (9th Cir.1980). The domestic defendants offer no rebuttal to these authorities. We conclude that the domestic defendants' immunity was lost when they conspired with the foreign defendants.

Boycotts

A second, independent ground exists why the McCarran-Ferguson Act defense does not work for any of the defendants. The Sherman Act applies to persons or companies in the insurance business if they agreed to a boy-

cott or engaged in acts of boycott or coercion. The allegations of the plaintiffs, here accepted as true, charge agreements by the defendants to boycott nonconforming insurers and acts of boycott and coercion. No immunity for such agreements and acts exists.

The defendants' position is that they could confer and agree on the terms on which insurance would be offered; the immunity in so doing is incontestable. But they are charged with much more: with agreeing to refuse reinsurance for CGL risks unless ISO amended its 1984 CGL form; with coercing ISO and ISO members to adopt the terms the defendants wanted; with coercing primary insurers to use the claims-made form; with agreeing to exclude from all casualty and property treaty reinsurance written in London all pollution coverage for American risks. The facts underlying these allegations are asserted in some detail, including, the actions of Hartford, CIGNA, Aetna, and Allstate in 1984 in bringing pressure on the ISO staff and other ISO members; the meeting of March 2, 1984 between representatives of Hartford and representatives of General Re when they agreed to coerce ISO to accept their demand; the successful effort of General Re with RAA so that on March 26, 1984, RAA created a committee, consisting of five of the defendant domestic reinsurers, to force revision of the ISO forms of CGL insurance; the agreement of this committee on June 15, 1984 to boycott the 1984 forms, followed by a letter from RAA to ISO on June 19, 1984, stating that the members of RAA would not provide reinsurance for coverages written on the 1984 forms; the enlistment of Thomas Greene to carry this message to ISO, as he did in a speech to the ISO directors on June 21, 1984.

Hartford, Aetna, CIGNA, and Allstate—all according to allegations that here are accepted as the truth—also took the initiative to encourage a boycott of the 1984 ISO forms by the lead underwriters of North American casualty reinsurance at Lloyd's of London and used Thomas

Greene and Nick Graham of Carvill to carry the message to the London reinsurance market. As a result of these efforts, the lead underwriters, named as defendants here, met representatives of ISO at the Garrick Club in London on July 4, 1984 and indicated their resolve to eliminate the occurrence form. On September 19, 1984, at a dinner at the Board Room, a private club in New York City, a combination of representatives of the defendant domestic reinsurers and foreign underwriters communicated to ISO members their agreed demands for change. The following day ISO largely capitulated. Agreements to boycott and acts of implementation of the agreements are, in short, explicitly set forth in the complaints.

In the classic case on boycotts in the context of the McCarran-Ferguson Act, *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531, 98 S.Ct. 2923, 57 L.Ed.2d 932 (1978), four insurance companies entered into an agreement according to whose terms three of the companies would not sell insurance to doctors in order to force them to accept "new ground rules of coverage set by the fourth." *Id.* at 533, 98 S.Ct. at 2926. The Court found "an organized boycott" to exist, stating: "The enlistment of third parties in an agreement not to trade, as a means of compelling capitulation by the boycotted group, long has been viewed as conduct supporting a finding of unlawful boycott." *Id.* at 544-45, 98 S.Ct. at 2931. That is exactly what Hartford and the other defendant prime insurers did here, always accepting the plaintiffs' allegations as true: they enlisted the reinsurers to compel capitulation by ISO and the insurers who had refused to go along with the Hartford demands. The London reinsurers did similarly in denying retrocessional coverage on policies covering pollution risks.

Congress, the Court said in *St. Paul*, intended to guard against "the danger that insurance companies might take advantage of purely permissive state legislation to establish monopolies and enter into restrictive agreements fall-

ing outside the realm of state-supervised cooperative action." *Id.* at 547, 98 S.Ct. at 2933. The states allege that Hartford and its allies engaged in precisely such conduct and that the reinsurers did the same among themselves.

The Court in *St. Paul* gave prominence to the explanation of the McCarran-Ferguson Act by Senator O'Mahoney, who said the vice in the insurance industry was "a system of private government which had been built up by a small group of insurance companies, which companies undertook by their agreements and understandings to invade the field of Congress to regulate commerce." *Id.* at 548, 98 S.Ct. at 2933. That is precisely what has happened in this case, according to the plaintiffs: the defendants have gone beyond joint action to their own regulation of the terms on which CGL and property insurance will be offered.

The district court, of course, was as familiar with *St. Paul* as this court is, but placed an emphasis that we do not on the Court's statement that the boycotting insurers there would not deal with the doctors "*on any terms.*" The district court supplied italics for this phrase which is unemphasized in the Court's opinion. Compare *In re Insurance Antitrust Litigation*, 723 F.Supp. at 476, with *St. Paul*, 438 U.S. at 552, 98 S.Ct. at 2935. The issue before the Court was whether "boycott" in the McCarran-Ferguson Act meant boycotts directed against policyholders as well as boycotts directed at competitors. *Id* at 552, 98 S.Ct. at 2935. The Court held the term to include both kinds of boycott. The description of the boycott at issue was not made as a definition excluding from the definition refusals to deal except on the terms demanded. The evil of a boycott is not its absolute character but the use of the economic power of a third party to force the boycott victim to agree to the boycott beneficiary's terms. So the three malpractice insurers in *St. Paul* used their economic power to force doctors to

accept St. Paul's terms; so here, the defendant reinsurers and London underwriters used their economic power, their refusal to reinsure, to force ISO and its recalcitrant members to accept the terms Hartford and its allies wanted. They, if plaintiffs are correct in their allegations, engaged in a boycott.

The district court limited the term "boycott" in a second way, quoting *Feinstein v. Nettleship Co.*, 714 F.2d 928, 933 (9th Cir. 1983), *cert. denied*, 466 U.S. 972, 104 S.Ct. 2346, 80 L.Ed.2d 820 (1984): "Because [the agreement] in no way limited the doctors' ability to deal with third parties, the agreement itself is not an agreement to boycott. . . ." But this dictum is taken from its context. In *Feinstein* an agreement between a county medical association and an insurance agent led the defendant insurer to provide malpractice insurance only to members of the association. The plaintiff doctors could buy insurance from other insurers and did not contend that they were subject to a boycott; what they objected to was the "inherently coercive" power of the defendants' "monopoly power." *Id.* at 933. We observed that the plaintiffs' objection to monopoly power was an invocation of section 2 of the Sherman Act, and by its terms the McCarran-Ferguson Act gave immunity from this part of the Sherman Act. *Id.* at 933-34. *Feinstein* is patently very different from the case where boycotts are alleged by plaintiffs who say that the defendants conspired to restrict primary insurance by the reinsurers' agreement to a boycott.

Why were the charges of the complaint not as plain to the district court as they appear to be on appeal? Because the district court took the position that the insurers' and reinsurers' agreement on terms was immune and that such agreement "comprehends efforts to seek agreement by others, including those who might be unwilling to agree were it not for economic exigencies." *In re Insurance Antitrust Litigation*, 723 F.Supp. at 478.

But when "the economic exigencies" are produced by conspirators who refuse to supply reinsurance if the unwilling insurer does not agree, a boycott is in effect and is being implemented. The defendants are charged with boycotts, and the allegations, taken as true, destroy their McCarran-Ferguson Act immunity.

Excess and Umbrella Insurance. No boycotts are alleged as the defendants' modus operandi in respect to these branches of insurance. The states say that they are parts of the insurance business unregulated by the states and so not immune under McCarran. The district court held to the contrary, finding that all of the relevant states had statutes "broad enough to apply to any persons in the business of insurance." *In re Insurance Antitrust Litigation*, 723 F.Supp. at 474.

The domestic sellers of excess and umbrella insurance were, as the district court held, exempt. But they engaged in agreements—so it is stated—with the non-exempt Lloyd's underwriters, Merrett and Three Quays. Their own exemption was lost by acting in concert with non-exempt parties. *Group Life and Health Ins. Co.*, 440 U.S. at 231, 99 S.Ct. at 1083.

The State Action Defense

If the states have no regulatory authority over the foreign entities and if combination with the latter forfeits the immunity of the domestic companies, a third line of argument advanced by some defendants works even less well for them. These defendants, referring to those states whose regulatory agencies approved the revised ISO form, contend that there was not only state regulation but state action, and that therefore they have immunity under *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). The relevant states, they argue, had a clearly articulated policy to displace competition with regulation when they permitted "the collective development" of insurance policy forms and actively su-

pervised the contents of the forms. The action by the states, they assert, insulates them under *Parker* entirely apart from their *McCarran* exemption.

Their argument fails because nothing in the affidavit evidence submitted by the defendants shows that the relevant states supervised or approved the boycotts used to produce agreement on the forms. The plaintiffs, the defendants object, produced no evidence countering their evidence. The plaintiffs did not need to do so: the defendants had made no showing of state action endorsing the boycotts.

The defendants are in the same position as the defendants in *St. Paul:* the policy changes desired by St. Paul were assumed by the court to have been filed with the state insurance director. The Court observed that there was no suggestion that Rhode Island, "in furtherance of its regulatory policies, authorized the concerted refusal to deal on any terms with St. Paul's policyholders." *St. Paul*, 438 U.S. at 554 n. 26, 98 S.Ct. at 2936 n. 26. We have adopted the same distinction: state approval of one activity is not state approval of a related but distinct activity. *Medic Air Corp. v. Air Ambulance Authority*, 843 F.2d 1187 (9th Cir.1988). The alleged anticompetitive conduct in the present case, as in *Medic Air Corp.*, was neither a reasonable nor necessary consequence of the conduct regulated and approved by the state. *Id.* at 1189. The agreements to refuse to reinsure were not state action.

The Connecticut Claim of a General Conspiracy. The London reinsurers challenged the claim in the Connecticut complaint that included both casualty and property insurance and the reinsurance and retrocessional insurance connected therewith. The district court observed that property insurance had not been alleged to have a connection with CGL insurance or with the market in which CGL insurance is sold. The district court there-

upon granted the motion to dismiss this claim. *In re Insurance Antitrust Litigation*, 723 F.Supp. at 484.

The district court rightly objected to a defect in this claim. The plaintiffs moved to amend. The district court denied the motion. The defendants say the motion was too late. But the district court did not deny amendment because the plaintiffs moved too late. It denied amendment because the plaintiffs' entire theory "will not stand under the law." *In re Insurance Antitrust Litigation*, 723 F.Supp. at 490. We are free to review this legal conclusion de novo. It is not consistent with this opinion. The plaintiffs' basic theory is maintainable. On remand of the case to the district court, the plaintiffs should be afforded the opportunity to amend.

Comity

A statute enacted in 1982 declares that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations." Foreign Trade Antitrust Improvement Act of 1982, 15 U.S.C. § 6a (the FTAIA). But the statute immediately adds, "unless (1) such conduct has a direct, substantial, and reasonably foreseeable effect (A) on trade or commerce which is not trade or commerce with foreign nations. . . ." *Id.* The defendants contended in the district court that the FTAIA barred the plaintiffs because the conduct complained of in the London reinsurance claims related to commerce that was "wholly foreign commerce." The district court rejected this argument, holding as follows: "The subject matter of the alleged agreement, however, concerned the provision of reinsurance within the United States, and the allegations of effects in United States markets are sufficient to preclude a characterization of wholly foreign commerce." *In re Insurance Antitrust Litigation*, 723 F.Supp. at 486. By finding "the effects" sufficient to preclude application of the statute, the district court implicitly found that their impact on the commerce of the United States met the stat-

utory standard of being "direct, substantial and reasonably foreseeable."

On appeal, the London reinsurers devote a single sentence in a single footnote to restating their view that the FTAIA bars the claims directed at conduct within the London reinsurance market. These defendants offer neither evidence nor authority to provide a basis for overturning the district court's holding. We reaffirm its conclusion that the FTAIA is no bar to any of the plaintiffs' claims.

The district court, however, found that international comity forbade its exercise of its jurisdiction over the British defendants. The district court acknowledged that as to this issue its application of the FTAIA might be argued to be decisive. *Id.* at 486, n. 28. But there were no court decisions so holding. The House Report on this legislation stated that it had "no effect on the court's ability to employ notions of comity." H.R.Rep. No. 97-686 at 13 (1982), *reprinted in* 1982 *U.S. Code Cong. & Admin. News* at 2431, 2498. The district court prudently concluded that it should apply the analysis of comity set out in *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir.1976) (*Timberlane I*).

On appeal, the plaintiffs renew their argument: the Foreign Trade Antitrust Improvement Act of 1982, 15 U.S.C. § 6a, is dispositive. The defendants do not reply to their argument but by implication of their insistence on *Timberlane* do not concede. We strike a middle position. We do not believe a *Timberlane* analysis (see *infra*) can be unaffected by the statute. If a complaint survives the new bar of 15 U.S.C. § 6a because the conduct has "a direct, substantial, and reasonable foreseeable effect" on American commerce, it is only in an unusual case that comity will require abstention from the exercise of jurisdiction. But as the legislation does not eliminate comity, a court should look to see if the case before it is one in which comity still has a role to play.

Timberlane I was an opinion of this court written by Judge Herbert Choy which "has commanded a wide following," Atwood & Brewster, *Antitrust and American Business Abroad* 1, 162-63. As an advance upon Judge Learned Hand's exposition of the law of extraterritorial application of American antitrust law in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2nd Cir. 1945), *Timberlane* was "a major development." Atwood & Brewster, 1, 163. Rejecting the simple test of the effect of the charged conduct upon American commerce, *Timberlane* adopted "a jurisdictional rule of reason." *Timberlane I*, 549 F.2d at 613. We were to "weigh" and to "balance" the various considerations—the two metaphors indicated that a court should examine each relevant factor, assign its relative importance, and come to a conclusion by comparing the relative importance of the elements involved. We now conduct this examination and evaluation in terms of the factors enumerated by *Timberlane*.

First: The Degree of Conflict With Foreign Law or Policy. The government of the United Kingdom has filed a brief as amicus on this appeal. That brief informs us that the Lloyd's Acts 1871-1982 provide detailed regulation of the Society of Lloyd's. The regulation is supplemented by the Insurance Companies Act of 1982, which applies to most insurance companies as well. The Restrictive Trade Practice (Services) Order exempts certain insurance services from the Restrictive Trade Practices Act of 1976. See *In re Insurance Antitrust Litigation*, 723 F.Supp. at 488. The district court found that application of the antitrust laws to the London reinsurance market "would lead to significant conflict with English law and policy." *Id.* at 489. The British brief reiterates that conclusion; we do not doubt its accuracy. Such a conflict, unless outweighed by other factors, would by itself be reason to decline exercise of jurisdiction. *Timberlane Lumber Co. v. Bank of America*, 749 F.2d 1378,

1384 (9th Cir.1984) (*Timberlane II*), *cert. denied*, 472 U.S. 1032, 105 S.Ct. 3514, 87 L.Ed.2d 643 (1985).

Second: The Nationality or Allegiance of the Parties and the Locations or Principal Places of Business of the Corporations. All of the plaintiffs are located in the United States. There is a substantial American interest in hearing their case. That interest is increased because nineteen of the plaintiffs are themselves states of the United States. The defendants named in certain counts are English or located in England. The district court found that "many of the corporate defendants," including those located in England, "are subsidiaries of American corporations and may be influenced by the allegiance of their American parents." *In re Insurance Antitrust Litigation*, 723 F.Supp. at 489. The interests of Britain are at least diminished where the parties are subsidiaries of American corporations. *United States v. Vetco, Inc.*, 691 F.2d 1281, 1289 (9th Cir.), *cert. denied*, 454 U.S. 1098, 102 S.Ct. 671, 70 L.Ed.2d 639 (1981). Moreover, although some counts of the complaints have named only the English reinsurers as defendants, other counts charge them as coconspirators with American insurers. As to these counts, the interest of an American court in being able to judge claims against an American company is high. It would not make much sense to dismiss the London defendants on some counts and hold them answerable on others. On balance, the presence of the American plaintiffs, many American defendants and some American subsidiaries is a factor pointing towards the exercise of jurisdiction.

Third: The Extent to Which Enforcement by Either State Can Be Expected to Achieve Compliance. It would be unrealistic to expect a British court to enforce an American court's injunction against Lloyd's. It would not be unrealistic to expect an American court to be able to obtain compliance with its orders by the subsidiary of an American parent and to be able to affect the way the

foreign defendants conducted themselves in the United States. Damages, if awarded, could be collected from assets of the foreign defendants within the United States. The decree of an American court setting out the obligations of the American insurers would undoubtedly be effective and surely would have an impact on the way the American insurers did business with the foreign defendants. Substantial compliance, in short, could be achieved. This factor is in favor of the exercise of jurisdiction.

Fourth: The Relative Significance of Effects on the United States as Compared With Those Elsewhere. The comparison led to the ultimate dismissal of the Timberlane suit in *Timberlane II:* the effects of the conduct charged were substantial in Honduras and minimal in the United States. *Timberlane II*, 749 F.2d at 1385. The case here is just the reverse. The effects are minimal, or at any rate not large in England, and they are, as implicitly found by the district court, "direct, substantial, and reasonably foreseeable" in the United States, as to which Lloyd's does at least half of its casualty underwriting. Accepting as true the plaintiffs' allegations, the actions of the foreign defendants have had the kind of "real economic consequences" for the American economy that strongly weigh in favor of the exercise of jurisdiction. *See* Atwood and Brewster, 1, 169.

Fifth: The Extent to Which There is Explicit Purpose to Harm or Affect United States Commerce. The purpose of the agreements to boycott was to affect the insurance business in the United States. The district court thought that the purpose was "the legitimate business purpose" of reducing the defendants' exposure to certain kinds of risks. *In re Insurance Antitrust Litigation*, 723 F.Supp. at 490. Both purposes existed. But in applying the jurisdictional test it is the purpose to affect American commerce that is more important. The compliance of the charged conduct with the law of the foreign jurisdiction has already been taken into account under the first factor.

The fifth factor depends on the relation of the conduct to the United States: was it intended to have effects here? The answer in this case must be yes. So the complaints charge. The fifth factor strongly weighs in favor of the exercise of judgment.

Sixth: The Foreseeability of the Effects on American Commerce. The district court concluded that the defendants conceded that the effects were foreseeable. *Id.* As intended, the effects were, of course, foreseeable. As they were substantial, their foreseeability becomes a strong factor favoring the exercise of jurisdiction.

The Balance. A single factor points toward abstention: the conflict with a long-established British policy towards a venerable British trade, the underwriting of insurance. Every other factor—nationality, likelihood of compliance, the significance of the effects on American commerce, their foreseeability and their purposefulness—points to the appropriateness of exercising jurisdiction. Unless we were to create a kind of analogue of the McCarran-Ferguson Act for insurance business regulated by a foreign country and treat Lloyd's as immune, the district court should exercise jurisdiction. No authority warrants us in creating a special immunity for insurance regulated by Britain. Comity does not require it. Nothing overcomes the weight of the findings already made under the Foreign Trade Antitrust Improvements Act. The comity factors of *Timberlane* indicate that the court's jurisdiction of the subject matter that exists must be exercised.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. MDL 767

IN RE INSURANCE ANTITRUST LITIGATION.

Oct. 10, 1989

REVISED MEMORANDUM OF
DECISION AND ORDER

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SCHWARZER, District Judge.

I. INTRODUCTION

Nineteen states and numerous private plaintiffs have brought actions against a group of insurance companies, reinsurance companies, underwriters, brokers, and individuals, and the Insurance Services Office, Inc. ("ISO"), charging them with violations of the federal antitrust laws and state laws.[1] The charges rest on alleged conspiracies, boycotts, threats, intimidation, and other coercive conduct by defendants to restrict the availability of certain coverage under policies for commercial general liability insurance ("CGL") and property insurance. The filing of these complaints followed lengthy investigations conducted by the regulatory agencies of several states.[2]

Defendants have moved to dismiss, for judgment on the pleadings, and for summary judgment, and plaintiffs have made cross-motions. For purposes of these motions, the well-pleaded allegations of the complaints are accepted as true, and any factual disputes and inferences are resolved in plaintiffs' favor.

Copies of the Court's proposed ruling were distributed to counsel well in advance of the hearing, and the Court has considered the arguments of counsel in reaching the decision reflected in this memorandum.

II. FACTUAL BACKGROUND

CGL insurance protects the insured against the risk of liability to third parties for bodily injury or property damage. It is purchased by businesses, non-profit groups, and governmental entities. Defendants Hartford Fire In-

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[1] For a list of the parties and of the actions encompassed by this ruling, see Appendix.

[2] Moreover, under the Court's pretrial order, the parties were free to conduct discovery insofar as necessary for these motions.

surance Company ("Hartford"), Allstate Insurance Company ("Allstate"), Aetna Casualty and Surety Company ("Aetna"), and CIGNA Corporation ("CIGNA") are primary insurers who are major providers of CGL insurance.[3] CGL insurance is written predominantly on standard policy forms developed by ISO.

ISO is an association of more than one thousand property or casualty insurers, including Hartford, Allstate, Aetna, and CIGNA. It is licensed as a rating, rate service, and advisory organization in all fifty states. One of its primary functions is to develop standardized policy forms for property and casualty insurance that comply with state regulations and will be accepted by state insurance departments. On behalf of its members, ISO files standardized policy forms with state insurance departments. ISO also collects historical loss data, projects future loss trends, and calculates advisory rates for insurance.

In the late 1970s, ISO began to develop a revision of the standard CGL form then in use. In 1984, ISO filed or lodged with state insurance departments two proposed new policy forms for CGL insurance. These forms substantially modified coverage previously available to the insured. One of the forms was a "claims-made" policy under which coverage was limited to claims made during the policy period regardless of when the occurrence out of which the claim arose had taken place. This represented a reduction in the coverage available under the previous CGL policy form which was an "occurrence-based" form; under that form, the insured was covered for claims arising out of occurrences during the policy period, no matter when asserted, thus exposing insurers to so-called "long tail risks" that could arise long after the policy period. The proposed claims-made form reduced that ex-

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[3] CIGNA is a holding company having subsidiaries which are primary insurers.

posure and shifted the risk of future claims to the insured. The other proposed form was a modified occurrence policy.

These forms became the subject of widespread debate and controversy in the insurance industry. Considerable differences of opinion arose over what should trigger coverage, whether retroactivity of claims-made coverage should be limited, whether the pollution exclusion should be modified, and whether defense costs should be limited by the policy limits.

In their complaint, plaintiffs charge defendants Hartford, CIGNA, Allstate, and Aetna with engaging in a concerted effort to block adoption of the 1984 forms because those forms did not restrict coverage sufficiently. Plaintiffs allege that these defendants entered into conspiracies with certain domestic and foreign defendant reinsurance companies, underwriters, and their representatives to "boycott" the 1984 forms unless a retroactive date was added to the claims-made form and a pollution exclusion and defense cost cap were added to both forms. Plaintiffs allege that as a result of the efforts of Hartford, Allstate, Aetna, and CIGNA, certain domestic and London reinsurers threatened to "boycott" North American CGL risks unless these changes were made in the claims-made form and the occurrence form was eliminated. Also as a result of these efforts, the ISO executive committee in September 1984 voted to include a retroactive cut-off date in the claims-made policy form, to exclude pollution coverage from both forms, but to defer until later limiting defense costs, and to offer an occurrence form along with the new claims-made form.

Following this agreement, ISO, Hartford, Aetna, and representatives of the London reinsurers undertook joint efforts to promote the new forms. Reinsurers refused to accept new reinsurance business or renew old business unless the primary carrier agreed to switch to the claims-made form when available. Reinsurers also imposed "sun-

set dates" in their treaties limiting their exposure to losses on occurrence policies. Reinsurance underwriters also entered into an agreement to exclude pollution liability coverage from reinsurance treaties.

During the period from 1984 through 1986, when these events are alleged to have occurred, ISO lodged or filed the proposed forms with the insurance departments of all states. Departments in thirty-five states held public hearings and the policy terms that are the subjects of the complaints were discussed within the industry and in public forums. As a result ISO filed or lodged several revisions of its proposed forms with the state insurance departments. At the conclusion of the various states' proceedings in 1986, all of the plaintiff states and the two non-plaintiff states in which individual plaintiffs reside had approved the ISO forms with the following exceptions: Massachusetts and New Jersey disapproved them, New York approved only the occurrence form, and California and Colorado, having no procedure for approval, took no action. Thereafter ISO withdrew its data collection and risk estimation support for the pre-1984 CGL form.

In 1986, ISO and certain defendants agreed that ISO should also develop standard CGL umbrella and excess policy language. In June 1986 ISO released policy language providing for a retroactive date on claims-made policies, a pollution exclusion, and defense costs within policy limits.

Finally, in 1987 domestic and London retrocessional reinsurers [4] are alleged to have entered into an agreement regarding property insurance to use their "best endeavors to ensure that all U.S.A. and Canadian exposed [property] insurance/reinsurance business attaching on or after 1st January, 1987 will only be written where the original business includes a seepage and pollution exclusion wherever legal and applicable."

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[4] Retrocessional insurance is insurance for reinsurers.

III. THE FEDERAL LAW VIOLATIONS CHARGED

The state complaints fall into two groups depending on when they were filed. The First Wave Complaints each contain eight federal claims.[5] The Second Wave Complaints each contain six federal claims.[6] All complaints also contain pendent state law claims. The private complaints track the state complaints.

The First Claim of the Second Wave Complaints alleges a global conspiracy by all defendants in violation of Section One of the Sherman Act, 15 U.S.C. § 1,

> for the purpose and with the effect of shrinking the scope of CGL property/casuality insurance and reinsurance and retrocessional reinsurance, . . . to . . . reduce financial exposure to such risks and to increase underwriting profits therefrom.

(Conn.Compl't ¶ 117.) Plaintiffs allege that defendants used boycotts, coercion, and intimidation to limit available coverage. (*Id.* ¶ 118(a).) No corresponding claim is made in the First Wave Complaints.

The Second Claim of the Second Wave Complaints and the First through Fourth Claims of the First Wave Complaints allege a conspiracy by defendants Hartford, Allstate, Aetna, CIGNA, ISO, and certain others[7] to manipu-

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[5] First Wave Complaints were filed by Alabama, Arizona, California, Massachusetts, New York, West Virginia, and Wisconsin. Citations to First Wave Complaints are to the California complaint.

[6] Second Wave Complaints were filed by Alaska, Colorado, Connecticut, Louisiana, Maryland, Michigan, Minnesota, Montana, New Jersey, Ohio, Pennsylvania, and Washington. Citations to Second Wave Complaints are to the Connecticut complaint.

[7] The defendants named in these claims are as follows:

The Second Claim of the Second Wave Complaints alleges that defendants Robin A.G. Jackson, Merrett Syndicate, Three Quays, Janson Green, Edwards & Payne, C.J.W., Thomas A. Greene, R.K. Carvill, RAA, General Re, Constitution Re, Mercantile & General

late the ISO design process for CGL forms to limit the available coverage. Plaintiffs allege that defendants conspired to restrict the terms under which reinsurance coverage would be provided for CGL risks, to refuse to provide reinsurance unless the 1984 form were amended to incorporate defendants' terms, to coerce ISO and its members to adopt the coverage terms and exclusions agreed to by defendants, and to boycott the forms unless amended. (Conn.Compl't ¶¶ 122-123; Cal. Compl't ¶¶ 113-114, 118-119, 123-124, 128-129.)

The Third Claim of the Second Wave Complaints and the Fifth Claim of the First Wave Complaints in substance charge certain defendants [8] engaged in the reinsurance business at Lloyd's of London with a conspiracy to restrict the terms under which reinsurance coverage would be provided for CGL risks and to refuse to rein-

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Re, Prudential Re, North American Re, and Winterthur Swiss and other co-conspirators were involved. Louisiana also names INA.

The First Claim of the First Wave Complaints alleges concerted action by domestic defendants and also names RAA, General Re, Constitution Re, Mercantile & General Re, Prudential Re, North American Re, Winterthur Swiss, and Thomas A. Greene.

The Second Claim of the First Wave Complaints alleges concerted action by foreign defendants and also names Robin A.G. Jackson, Merrett Syndicate, Three Quays, Janson Greene, Edwards & Payne, C.J.W., J. Brian Hose, R.K. Carvill, and Thomas A. Greene. New York and Wisconsin do not name J. Brian Hose; Arizona does not name Robin A.G. Jackson.

The Third Claim of the First Wave Complaints alleges concerted action by domestic and foreign defendants and names the same defendants as in the First and Second Claims except for C.J.W. and J. Brian Hose.

The Fourth Claim of the First Wave Complaints alleges concerted action by domestic and foreign defendants and ISO and names the same defendants as in the Third Claim.

[8] Peter N. Miller, Robin A.G. Jackson, Merrett Syndicate, Three Quays, Janson Greene, Edwards & Payne, and Ballantyne McKean. Arizona does not name Peter N. Miller or Robin A.G. Jackson.

sure CGL risks on occurrence forms by coercion and intimidation of primary insurers, among other things. (Conn.Compl't ¶¶ 127-128; Cal.Compl't ¶¶ 133-134.)

The Fourth Claim of the Second Wave Complaints and the Sixth Claim of the First Wave Complaints in substance charge certain defendants [9] engaged in the reinsurance business at Lloyd's of London with a conspiracy to restrict the terms under which casualty reinsurance coverage would be provided for CGL risks and to limit the availability of pollution coverage in primary casualty insurance. No boycott, coercion, or intimidation is alleged. (Conn.Compl't ¶¶ 132-133; Cal.Compl't ¶¶ 138-139.)

The Fifth Claim of the Second Wave Complaints and the Eighth Claim of the First Wave Complaints in substance charge certain defendants [10] engaged in the reinsurance business at Lloyd's of London with a conspiracy to restrict the terms on which property insurance and reinsurance coverage would be provided and to limit its availability by, among other things, agreeing to boycott the provision of retrocessional insurance unless the primary insurance excluded seepage, pollution, and contamination coverage. Conn.Compl't ¶¶ 137-138; Cal.Compl't ¶¶ 148-149.)

The Sixth Claim of the Second Wave Complaints and the Seventh Claim of the First Wave Complaints charge ISO, Allstate, Hartford, Aetna, and certain other defendants [11] with a conspiracy to restrict terms and conditions under which umbrella and excess insurance would be

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[9] Merrett Syndicate, Murray Lawrence, Edwards & Payne, D.P. Mann, C.J.W., Unionamerica, Terra Nova, Oxford, CNA Re, and Ballantyne McKean. Wisconsin does not name CNA Re and does name Robin A.G. Jackson.

[10] Unionamerica, Terra Nova, Excess, Edwards & Payne, Kemper Re, Merrett Syndicate, and Continental Re. Oxford is named only in all the Second Wave Complaints except Alaska's. Wisconsin also names CNA Re.

[11] Merrett Syndicate and Three Quays. CIGNA is named only in the Second Wave Complaints. Louisiana also names INA.

available. No boycott, coercion, or intimidation is charged. (Conn.Compl't ¶¶ 142-143; Cal.Compl't ¶¶ 143-144.)

IV. THE MOTIONS BEFORE THE COURT

Defendants have filed five motions to dismiss or for summary judgment on the following grounds:

A. Asserting antitrust immunity under the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 ("the McCarran Act"), all defendants have moved under Federal Rules of Civil Procedure 12(b)(6) and 56 to dismiss or for summary judgment.

B. Asserting the state action immunity doctrine, all defendants have moved under Rule 56 for summary judgment against all plaintiffs except California, Alaska, Colorado, and Montana on (a) the so-called global conspiracy claim of the Second Wave complaints, and (b) the policy form development claims.

C. Asserting lack of standing, all defendants except ISO, INA, Hartford, Allstate, Aetna, and CIGNA have moved under Rule 12(b)(6) for dismissal of all claims against them. (This motion does not encompass the claims against Merrett and Three Quays alleging an agreement in restraint of trade in the excess and umbrella insurance market.)

D. Asserting that there is "no factual allegation linking [them] in a 'global' conspiracy," foreign reinsurer defendants have moved under Rule 12(b)(6) to dismiss the global conspiracy claim of the Second Wave complaints.

E. Asserting lack of subject matter jurisdiction and international comity, foreign reinsurer and retrocessional reinsurer defendants and one broker have moved under Rule 12(b)(1) to dismiss the two claims alleging conspiracies to eliminate pollution coverage.

The States have moved to strike the defense based on the state action immunity doctrine.

V. DISCUSSION

A. THE McCARRAN-FERGUSON ACT DEFENSE

Defendants have moved for summary judgment on all federal claims on the ground that their conduct is immunized from antitrust liability by the McCarran Act. Although the primary thrust of the motion is said to be directed at those claims which are based on policy form development activities, the controlling principles apply to defendants' underwriting-related actions as well.[12] Stripped of their pejorative allegations, those claims charge a conspiracy to reduce the exposure of defendant insurers and reinsurers under CGL policies. The defendants sought to accomplish their objective by bringing about changes in standard policy language and by avoiding underwriting or reinsuring risks written on disfavored policy terms. All of this they did in large part by collective action, and it may be assumed that plaintiffs could prove a consequent lessening of competition among defendants and a diminution of options available in the market for CGL insurance, resulting in a restraint of trade.

In the absence of the McCarran Act, those allegations may well state a claim for relief under the Sherman Act. The issue raised by these motions is whether plaintiffs could prove a set of facts under those general allegations that would entitle them to relief notwithstanding the McCarran Act.

That Act states:

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the sev-

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[12] Those defendants who are named in claims asserting conspiracies in connection with the reinsurance markets have also moved to dismiss on other grounds. They join in this motion as an alternate ground for dismissal. *See infra* § V.C.

> eral States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . .: Provided, That . . . the Sherman Act, . . . the Clayton Act, and . . . the Federal Trade Commission Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

15 U.S.C. § 1012.

Section 1013(b) of the Act further provides:

> Nothing contained in this chapter shall render the . . . Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

The McCarran Act created limited antitrust immunity for the business of insurance following the Supreme Court's departure, in *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944), from prior holdings that insurance is not a transaction in interstate commerce. *See St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 538-39, 98 S.Ct. 2923, 2928-29, 57 L.Ed.2d 932 (1978). It was passed in response to widespread concern that the states should not be precluded from continuing to regulate and tax the insurance industry. It immunizes the business of insurance from the antitrust laws but only to the extent that it is regulated by the states and does not involve boycott, coercion, or intimidation. *See Feinstein v. Nettleship Co.*, 714 F.2d 928, 931 (9th Cir. 1983), *cert. denied*, 466 U.S. 972, 104 S.Ct. 2346, 80 L.Ed.2d 820 (1984). Like all antitrust immunities, it must, of course, be narrowly construed. *See Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231, 99 S.Ct. 1067, 1083, 59 L.Ed.2d 261 (1979).

The application of the McCarran Act immunity involves a three step analysis:

(1) Whether the conduct is within the scope of the business of insurance;

(2) Whether that business is regulated by the states; and

(3) Whether the conduct involves boycott, coercion, or intimidation.

(1) *The Business of Insurance*

In *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119, 102 S.Ct. 3002, 73 L.Ed.2d 647 (1982), the Supreme Court stated the criteria for what constitutes the business of insurance for purposes of the McCarran Act as follows:

> *first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry.

458 U.S. at 129, 102 S.Ct. at 3009.

And in *Group Life & Health Insurance Co. v. Royal Drug Co.*, the Court said:

> References to the meaning of the "business of insurance" in the legislative history of the McCarran-Ferguson Act strongly suggest that Congress understood the business of insurance to be the underwriting and spreading of risk. Thus, one of the early House Reports stated: "The theory of insurance is the distribution of risk according to hazard, experience, and the laws of averages. These factors are not within the control of insuring companies in the sense that the producer or manufacturer may control cost factors."

440 U.S. at 220-21, 99 S.Ct. at 1078 (citation omitted).

Plaintiffs do not dispute that the activities of defendants insofar as they relate to the terms and conditions of primary, excess, or umbrella insurance, are the business of insurance within the meaning of the McCarran Act. (*See* Plaintiff States' Unified Opposition Brief ("Unified Opp.") 37-40.) They contend, however, that reinsurance is not the business of insurance because it relates only indirectly to the spreading of the policyholder's risk and because, they contend, it is not an integral part of the policy relationship between the insurer and the insured. (*Id.*)

There is no authority for excluding reinsurance from the business of insurance. On the contrary, reinsurance was specifically referred to as a part of the business of insurance in the legislative history of the McCarran Act. *See* 90 Cong. Rec. A4406 (1944); 89 Cong.Rec. 6528 (1943). The Ninth Circuit applied the McCarran exemption to reinsurers as well as to the primary insurer in *Feinstein*. 714 F.2d at 930.

Plaintiffs urge an unreasonably narrow application of the *Pireno* test. Their own description establishes that reinsurance is an integral and vital part of the business of insurance. The complaints define reinsurance as "insurance for insurers." (*E.g.*, Conn.Compl't ¶ 4(p); Cal. Compl't ¶ 4(*o*).) They go on to describe reinsurance as

> a transaction whereby one insurance company, the reinsurer, agrees to indemnify another insurance company, the primary (or "ceding") insurer, for a designated portion of the insurance risks underwritten by the primary insurer. Reinsurance protects the primary insurer from catastrophic losses, and is heavily relied upon by prudent primary insurers. It also allows the primary insurer to sell more insurance than its own financial capacity might otherwise permit. Thus, the availability of reinsurance affects the ability and willingness of primary insurers to provide insurance to their customers.

(Conn.Compl't ¶ 4(p); *see also* Cal.Compl't ¶¶ 26-29, 34.)

Thus, reinsurance is no less a part of the process of underwriting and spreading risks than primary insurance. Plaintiffs' allegations rests, moreover, on the premise that the terms on which reinsurance is available affect the terms on which primary insurance is written and that the terms and availability of reinsurance directly affect the availability of insurance coverage to consumers. (Unified Opp. 13-16.) As plaintiffs' brief puts it, "by conspiracy to eliminate reinsurance for the consumer-demanded coverages, the reinsurers acted anticompetitively in reinsurance markets . . . [which] led inexorably to an injury to the States in the interrelated primary insurance markets." (*Id.* at 76.) Because reinsurance is thus an element of the policy relationship with the insured, it is part of the business of insurance. *See also SEC v. National Sec., Inc.*, 393 U.S. 453, 460, 89 S.Ct. 564, 568, 21 L.Ed.2d 668 (1960) (business of insurance includes "activities of insurance companies [that] relate . . . closely to their status as reliable insurers").

By the same logic, retrocessional insurance, which is "insurance for reinsurers" (Conn.Compl't ¶ 4(r)), is part of the business of insurance.[13]

(2) *Regulation by the States*

The condition of state regulation is satisfied by "a state regulatory scheme possess[ing] jurisdiction over the challenged practice." *Feinstein*, 714 F.2d at 933. "It is not necessary to point to a state statute which gives express approval to a particular practice." *Id.; see Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Service Bureau*, 701 F.2d 1276, 1287 (9th Cir.), *cert. denied*, 464 U.S. 822, 104 S.Ct. 88, 78 L.Ed.2d 96 (1983); *Dexter v.*

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[13] The argument that the exemption is lost as a result of joint action with non-exempt entities is without merit. *Klamath-Lake Pharmaceutical Association v. Klamath Medical Service Bureau*, 701 F.2d 1276, 1288 n. 12 (9th Cir.), *cert. denied*, 464 U.S. 822, 104 S.Ct. 88, 78 L.Ed.2d 96 (1983).

Equitable Life Assur. Soc., 527 F.2d 233, 236 (2d Cir. 1975); *Lawyers Title Co. of Mo. v. St. Paul Title Ins. Co.*, 526 F.2d 795, 797-98 (8th Cir. 1975); *Ohio AFL-CIO v. Insurance Rating Bd.*, 451 F.2d 1178, 1181-84 (6th Cir. 1971), *cert. denied*, 409 U.S. 917, 93 S.Ct. 215, 34 L.Ed.2d 180 (1972); *see also* P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 210.1b (Supp. 1988) (McCarran immunity distinguished from *Parker v. Brown* immunity; the former requiring only the existence of a state regulatory scheme, without regard to the intensity of state regulation).

This case involves the insurance business in twenty-one states.[14] The Ninth Circuit has held that California's scheme of regulation satisfies the McCarran Act. *Addrisi v. Equitable Assur. Soc. of the United States*, 503 F.2d 725, 728 (9th Cir. 1974), *cert. denied*, 420 U.S. 929, 95 S.Ct. 1129, 43 L.Ed.2d 400 (1975). The Court takes judicial notice of the laws of the other jurisdictions.[15] Each state has an insurance department with jurisdiction over policy forms. Sixteen of the plaintiff states and the two nonplaintiff states in which private plaintiffs reside require filing and review of policy forms, including umbrella and excess policies offered by admitted insurers. All of the states have licensed ISO and permit joint action by ISO and insurance companies with respect to policy forms. All of the states have unfair insurance trade practice statutes enabling them to proceed against conduct such as that alleged in the complaints. Although plaintiffs contend that reinsurance and umbrella and excess insurance are not regulated by the states, these statutes are broad enough to apply to any persons in the business

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[14] The nineteen plaintiff states plus Florida and Illinois, the two non-plaintiff states in which private plaintiffs reside.

[15] See Defendants' State-by-State Appendix accompanying their McCarran Act motion. The facts set forth in this paragraph have not been disputed in plaintiffs' opposition brief.

of insurance, including reinsurers.[16] These statutory schemes are sufficient to qualify under section 1012(b) of the McCarran Act. *See SEC v. National Securities, Inc.*, 393 U.S. 453, 459-60, 89 S.Ct. 564, 568-69, 21 L.Ed.2d 668 (1969) (state laws protecting or regulating, directly or indirectly, relationship between insurer and policy holder qualify); *FTC v. National Cas. Co.*, 357 U.S. 560, 564-65, 78 S.Ct. 1260, 1262, 2 L.Ed.2d 1540 (1958) (state unfair insurance advertising laws qualify); *Mackey v. Nationwide Ins. Co.*, 724 F.2d 419, 421 (4th Cir. 1984) (state unfair insurance practice laws that provide for administrative supervision and enforcement qualify).

Plaintiffs' argument that the regulatory schemes of the states do not reach the allegations of subversion of ISO's decision-making process and concerted activity to restrict the availability of coverages in the market is self-defeating. To avoid McCarran Act immunity, plaintiffs rely on allegations of boycott, coercion, and intimidation, and contend that this conduct is prohibited by the states. That prohibition is indeed contained in the unfair practice acts of each state, but the fact that it is satisfies the regulation prerequisite to immunity under section 1012.[17] *See*

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[16] Cal.Insur.Code § 790.01 is typical:

> This article applies to reciprocal and inter-insurance exchanges, Lloyds insurers, fraternal benefit societies, fraternal fire insurers, grants and annuities societies, insurers holding certificates of exemptions, motor clubs, nonprofit hospital associations, agents, brokers, solicitors, surplus line brokers and special lines surplus line brokers as well as *all other persons engaged in the business of insurance.*

(Emphasis added.)

[17] Cal.Insur.Code § 790.03(c) is typical:

> Entering into any agreement to commit, or by any concrete action committing, any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance.

In re Workers' Comp. Ins. Antitrust Litig., 867 F.2d 1552, 1558-60 (8th Cir.), *cert. denied*, ——U.S. ——, 109 S.Ct. 3247, 106 L.Ed.2d 593 (1989).

Plaintiffs' argument that the standards for state action immunity under *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), should apply to the McCarran Act lacks any support. As Professors Areeda and Hovenkamp point out, if the regulatory requirements under McCarran "were to coalesce with the *Parker* requirements, the scope of the McCarran-Ferguson Act would be largely irrelevant as a practical matter." P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 210.1b, at 97 (Supp. 1988). (*See infra* § V.B.(1).) Such an interpretation would tend to nullify Congressional intent in adopting the McCarran Act.

(3) *The Exclusion of Boycott, Coercion, and Intimidation*

The States have submitted a Statement of Material Facts in support of their unified opposition brief. (Unified Opp. 6-16.) The following facts are material to this section of the opinion.

Twenty of the defendants, including primary insurers, reinsurers, brokers, and underwriters, dissatisfied with the CGL forms approved by ISO in 1984 because those forms failed to eliminate occurrence and pollution coverage, "agreed to and undertook a course of concerted action" to limit the availability of certain CGL coverages, and twelve other defendants ultimately joined in. (*Id.* at 10-11.) This course of action included the following activities. To coerce ISO into revising its 1984 CGL forms, defendant reinsurers agreed to and did announce that reinsurance would not be provided for coverage written on the 1984 form. (*Id.* at 11.) In addition, certain defendants took "coercive action" by agreeing to announce and announcing that they would not provide reinsurance on occurrence policies and would impose sunset clauses in

their coverage.[18] (*Id.* at 12.) Certain defendants took "coercive action" by agreeing to include and including a pollution exclusion in their reinsurance treaties. (*Id.* at 13-14.) Certain defendants made a "coercive statement of intention not to provide reinsurance unless the primary policy excludes all property pollution coverage." (*Id.* at 14-15.) Finally, certain defendants agreed to eliminate the same coverage from excess and umbrella policy forms. (*Id.* at 15-16.) And ISO withdrew statistical support for its 1973 form. (*Id.* at 12.)

It will be noted that plaintiffs' statement does not allege a boycott. Nor does it (or the complaints) describe conduct that "accords with the common understanding of a boycott." *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 552, 98 S.Ct. 2923, 2935, 57 L.Ed.2d 932 (1978). As the Supreme Court described the conduct there in issue,

> The four insurance companies that control the market in medical malpractice insurance are alleged to have agreed that three of the four *would not deal on any terms with the policyholders* of the fourth. As a means of ensuring policyholder submission to new, restrictive ground rules of coverage, St. Paul obtained the agreement of the other petitioners, strangers to the immediate dispute, *to refuse to sell any insurance to its policyholders*. "A valuable service germane to [respondents'] business and important to their effective competition with others was withheld from them by collective action."
>
> The agreement binding petitioners *erected a barrier between St. Paul's customers and any alternative source* of the desired coverage, effectively foreclosing all possibility of competition anywhere in the relevant market. *This concerted refusal to deal went well be-*

[18] A "sunset clause" limits the reinsurer's liability to those claims presented to it by the primary insurer prior to a specified date.

> *yond a private agreement to fix rates and terms of coverage*, as it denied policyholders the benefits of competition in vital matters such as claims policy and quality of service.

Id. at 552-53, 98 S.Ct. at 2935-36 (citation omitted) (emphasis added).

In contrast, plaintiffs here charge no more than an agreement to restrict coverage. But they seek to piggyback this charge on conclusory allegations of pressure and compulsion that echo *Barry*. The decision in *Barry*, however, turned not on the pressure and compulsion directed at policy holders to submit to curtailed coverage, but on the agreement with competitors not to deal with those policy holders on any terms. As the Court said:

> Solely for the purpose of forcing physicians and hospitals to accede to a substantial curtailment of the coverage previously available, St. Paul induced its competitors to refuse to deal on any terms with its customers. *This agreement did not simply fix rates or terms of coverage;* it effectively barred St. Paul's policyholders from all access to alternative sources of coverage and even from negotiating for more favorable terms elsewhere in the market. The pact served as a tactical weapon invoked by St. Paul in support of a dispute with its policyholders. *The enlistment of third parties in an agreement not to trade, as a means of compelling capitulation by the boycotted group, long has been viewed as conduct supporting a finding of unlawful boycott.*

Id. at 544-45, 98 S. Ct. at 2931 (emphasis added).

Thus, the issue is not whether defendants used pressure to reduce the coverage available to buyers of insurance. The issue is whether they entered into concerted refusals to deal that denied consumers access to the markets for the desired coverages. The Ninth Circuit explained the meaning of boycott in *Feinstein:* "Because [the agree-

ment] in no way limited the doctors' ability to deal with third parties, the agreement itself is not an agreement to boycott or coerce the plaintiff to purchase the defendants' insurance." 714 F.2d at 933.

The distinction between lawful joint action and prohibited boycott and coercion is also explained in *Proctor v. State Farm Mutual Automobile Insurance Co.*, 561 F.2d 262 (D.C. Cir. 1977):

> The facts in *South-Eastern Underwriters* are a useful guidepost. Logically speaking, a simple agreement among insurance companies to charge certain premium rates could be viewed as a boycott agreement, since its observance would result in a collective refusal to deal with policyholders except at a fixed price. But the Supreme Court's opinion in *South-Eastern Underwriters* did not characterize the basic rate-fixing agreement in that case in terms of "boycott, coercion, or intimidation"; those terms were reserved for the additional activities utilized to enforce the agreement. Since the McCarran Act was passed in response to *South-Eastern Underwriters*, and since a construction of the boycott provision to encompass a simple rate-fixing agreement would indeed emasculate the Act's antitrust exemption, it is reasonable to infer that in a state-setting context something in the way of enforcement activity would be required to make out a claim of "boycott, coercion, or intimidation" within the meaning of the Act.

Id. at 274 (citation omitted).[19]

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[19] The *Proctor* court referred to the Supreme Court's opinion in *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944), which described the conduct of defendants as consisting of coercion and intimidation to force non-member insurance companies into the conspiracies and to compel persons who needed insurance to buy only from South-Eastern Underwriters on its terms.

This interpretation of boycott and coercion has been consistently followed, in the context of coverage as well as rates. *See, e.g., Meicler v. Aetna Cas. and Sur. Co.*, 506 F.2d 732, 734 (5th Cir. 1975) (parallel actions of insurance companies to refuse to offer insurance except under rate regulation scheme adopted by state not a boycott); *UNR Indus. Inc. v. Continental Ins. Co.*, 607 F. Supp. 855, 862-63 (N.D. Ill. 1984) (conspiracy among insurance companies to refuse to offer occurrence policies not a boycott); *Grant v. Erie Ins. Exch.*, 542 F.Supp. 457, 464-66 (M.D. Pa. 1982) (conspiracy to refuse to offer insurance covering work loss benefits of individuals killed in motor vehicle accidents not a boycott) *aff'd mem.*, 716 F.2d 890 (3d Cir.), *cert. denied*, 464 U.S. 938, 104 S.Ct. 349, 78 L.Ed.2d 314 (1983).

Professors Areeda and Hovenkamp concur with this view and reject the interpretation of *Barry* urged by plaintiffs:

> The implications of *St. Paul* are not clear. On the one hand, a horizontal agreement among competitors to set the terms of insurance policies—for example, price fixing—is a collective agreement not to deal on any other terms; by the agreement, each enlists the aid of the other, a third party, "to compel capitulation by the boycotted group," namely, insurance buyers. In this sense, virtually any horizontal agreement among competitors could be called a "boycott."
>
> However, there are two reasons for supposing that the Supreme Court did not mean to go that far. First, such a reading would eviscerate the immunity for horizontal agreements on the "business of insurance" and thus seems inconsistent with the statute. Second, *St. Paul* itself did involve an agreement to adopt similar terms. Instead, it was alleged that three insurers withdrew from the market for an anticompetitive purpose.

P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 210.2, at 107-08 (Supp. 1988).

The gravamen of the cases before the Court is alleged horizontal agreements relating to the terms on which the participants were willing to write insurance and reinsurance. By joint action in the ISO and in the reinsurance and umbrella and excess insurance markets, the various defendants sought to bring about the use of policies that would limit their exposure. There is no charge and no evidence that any defendants conspired to refuse to do business with any person or firm to achieve their objectives, or that by other improper means they enforced their collective decisions against others.[20]

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[20] At the hearing, plaintiffs argued that ISO's withdrawal of statistical support for the 1973 policy forms after regulatory approval had been given by the relevant states to new forms amounted to coercion. The complaints allege in relevant part:

> On July 1, 1987, ISO officially withdrew "support" of the 1973 CGL form. "Support" in this context includes the normal data collection and actuarial services performed by ISO in aid of its member companies. Without such support, most ISO members could not continue to use the 1973 occurrence form, because it is very difficult and expensive for any single company to duplicate the critical ISO support functions. (Cal. Compl't ¶ 99; Conn.Compl't ¶ 103.)

The conduct alleged, termination of statistical support for a superseded policy form, is on its face reasonable conduct that one would expect in the normal course of business. There is nothing inherently coercive or wrongful about it. There is no allegation that any insurer desired to continue to write insurance on the 1973 policy form but was coerced by defendants into not doing so by means of this conduct, and plaintiffs did not offer to amend their complaints or conduct specific discovery on this point. The allegation that "most ISO members" would find it "difficult and expensive . . . to duplicate the critical ISO support functions" is not sufficient to warrant subjecting these defendants to an antitrust action. *See Ocean State Physicians Health Plan Inc. v. Blue Cross & Blue Shield of Rhode Island*, 883 F.2d 1101, 1109 n.9 (1st Cir.1989) ("Coercion [under the McCarran Act] has not generally been interpreted to include situations where options have not been entirely closed off to the allegedly coerced parties, even though such options may have been made more expensive"). To hold otherwise would be somewhat ironic, for it is the McCarran Act that allows the insur-

The distinction between prohibited boycott and coercion and immune joint activities is illustrated by *In re Workers' Compensation Insurance Antitrust Litigation*, 867 F.2d 1552 (8th Cir.), *cert. denied*, —— U.S. ——, 109 S.Ct. 3247, 106 L.Ed.2d 593 (1989). That court held that "the practice of mere price fixing, i.e. a refusal to deal except at a specified price, without more," is not a McCarran Act boycott. *Id.* at 1561. "The crucial element . . . [of a boycott] is an effort to exclude or cause disadvantage to one or more competitors by cutting them off from trade relationships which are necessary to any firm trying to compete." *Id.* at 1561, n. 14 (quotation omitted). In reversing a grant of summary judgment of no boycott, the *Workers' Compensation* court relied on evidence of an agreement to exclude competing insurers from membership in the Minnesota Rating Association; such membership was required by Minnesota law as a condition to writing workers' compensation insurance in the state. *Id.* at 1563. In contrast, in the instant case the allegations are limited to collective refusals to do business except upon terms acceptable to defendants. There is not even a suggestion that any underwriter or reinsurer (or anyone else) was prevented from having free and unimpaired access to any market.

The purpose of McCarran Act immunity is to permit joint action by insurers and underwriters within the states' regulatory schemes to formulate policy terms and determine cov rage. While it is not a necessary part of the policy development process that the participants would then offer substantially similar policies to the public, it is a consequence that could be reasonably anticipated. To subject the participants in the collective form development

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ance industry, including defendants, to provide through ISO the suport functions which plaintiffs regard as critical; it makes little sense then to impose antitrust liability on defendants, who are permitted by the McCarran Act to agree to provide the support, for agreeing to discontinue it as to a policy form no longer in use.

process to the risk of antitrust liability for using the product of that process would effectually nullify the McCarran Act. It makes no sense, therefore, for the plaintiffs to rest their boycott claim on the allegation of such an agreement. It is also implicit that joint action comprehends efforts to seek agreement by others, including those who might be unwilling to agree were it not for economic exigencies, and again it makes no sense to assert that such efforts constitute non-immune coercion.

What the McCarran Act leaves unprotected is conduct which goes beyond the making and implementation of agreements to do business only on terms acceptable to the participant (even if such agreements would otherwise violate Section 1), such as refusals to deal on any terms and exclusion from alternative sources. *See Barry*, 438 U.S. at 544-45, 98 S.Ct. at 2931. Such conduct is not charged here.

Dismissal of a complaint for failure to state a claim is not proper unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957). But judgment of dismissal is appropriate if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations. *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988). Conclusory allegations without more are insufficient to defeat a motion to dismiss for failure to state a claim. *Id.*

Under the well-pleaded allegations of these complaints, plaintiffs could prove no boycott or coercion. Plaintiffs do not suggest that their pleadings could be amended to cure their deficiencies.

Nor have plaintiffs come forward with specific facts which raise a triable issue as to boycott or coercion. And this is true though plaintiffs in their capacity as

state regulators conducted lengthy investigations under their regulatory laws which gave them extensive access to the files and records at least of the domestic defendants as well as to other sources of relevant information. Plaintiffs have been given the opportunity also to conduct relevant discovery and have not suggested that they needed discovery to be able fairly to meet this motion.

Accordingly, all defendants are entitled to dismissal of the complaints without leave to amend, or in the alternative summary judgment (considering defendants' submissions outside the pleadings), on all federal law claims in the various complaints. In addition all defendants are entitled to judgment on the Sixth and Seventh Claims of the First Wave Complaints and the Fourth and Sixth Claims of the Second Wave Complaints for failure to allege boycott, coercion, or intimidation. *See Freier v. New York Life Ins. Co.*, 679 F.2d 780, 783 (9th Cir. 1982).

The foreign reinsurer defendants named in the Fifth, Sixth, and Eighth Claims of the First Wave Complaints and the Third, Fourth, and Fifth Claims of the Second Wave Complaints have joined in this motion as an alternate ground for dismissal. They have also made a motion to dismiss on the ground of international comity which the Court grants. (*See infra* § V.E(3).) Because that motion rests on the proposition that those defendants are not subject to the antitrust laws, it raises the question whether, as a result, they also are not subject to state regulation to a degree sufficient to be entitled to McCarran Act immunity. It does not appear necessary to resolve that issue here, however; if the dismissal on comity grounds is sustained, the alternative ground for dismissal under the McCarran Act will be moot. Conversely, if it is not sustained, it will be because American regulatory laws apply to them and hence the McCarran Act as well.

B. STATE ACTION IMMUNITY, STATUTORY INTERPRETATION, AND CAUSATION

Defendants have moved for summary judgment with respect to those claims which "relate to the collective form-making process in those states that took action to approve, disapprove or withhold approval of the revised ISO CGL forms." (Def. Memo. 1.) This motion, therefore, is limited in its scope; it does not reach conduct outside of the collective activities to revise the CGL policy forms and it does not apply to plaintiff states, or plaintiffs in states, that do not have a procedure for approval, disapproval, or withholding approval of policy forms, namely Alaska, California, Colorado, and Montana. Because plaintiffs' opposition memorandum either misconceives or ignores the narrow scope of this motion, its arguments are in large part irrelevant.

(1) *State Action Immunity*

In *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1934), the Supreme Court held that the Sherman Act was not intended to prohibit states from imposing restraints on competition. The circumstances under which this state action immunity extends to private parties were defined in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980): "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy,' and, second, the State 'must supervise actively any private anticompetitive conduct.'" 445 U.S. at 105, 100 S.Ct. at 943 (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410, 98 S.Ct. 1123, 1135, 55 L.Ed.2d 364 (1978) (Brennan, J.)).

(a) State Policy

There is no question that all of the states have clearly articulated and affirmatively expressed policies permitting collective policy form development activities. Each of the

states has licensed ISO and its members to engage in certain collective activities, including filing of rates and policy forms and developing policy forms.

These actions are governed by *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985). There the Supreme Court applied state action immunity to collective rate making activities under state laws permitting—but not requiring—motor carriers to agree on rates subject to the supervision of the state public services commission having authority to accept, reject, or modify the agreed rates. The same situation is presented here. The states have authorized the insurers to agree on policy forms subject to the supervisory authority of the insurance regulators. Most of the states require regulatory approval before a form may be used; others permit a form to be used unless or until the regulators disapprove it. (Def.Memo. 5-6.) And here, as in *Southern Motor Carriers Rate Conference*, insurers were not required to participate in the collective activities of ISO and were free to use policies other than those developed and sponsored by ISO.

Plaintiffs argue that the states have authorized only voluntary joint action, not coercion or boycotts. But the fact that the states prohibit coercion and boycotts does not diminish the immunity flowing from the authority to conduct collective policy development activities. That immunity depends on the presence of active state supervision, as discussed below, and the states' prohibition of coercion and boycott is simply one aspect of this supervision. To argue that the presence of such state law prohibitions nullifies the state action immunity would be to turn the doctrine on its head. The premise of that doctrine is that it immunizes conduct that might otherwise run afoul of the antitrust laws. It does so "to resolve conflicts that may arise between principles of federalism and the goal of the antitrust laws, unfettered competition in the marketplace." *Southern Motor Car-*

riers Rate Conference, 471 U.S. at 61, 105 S.Ct. at 1729. It achieves that end by allowing states "to adopt policies that permit, but do not compel, anticompetitive conduct by regulated private parties." *Id.* at 66, 105 S.Ct. at 1731. Under the regulatory schemes of the relevant states, insurers are permitted to engage in collective policy development but are not required to do so or to adopt the collectively produced policies; activities directed to an insurer's individual decision what coverage to offer, as distinct from what terms to include in ISO policy forms, are not claimed to be covered by state action immunity and are not addressed by this motion.

Plaintiffs' reliance on *Medic Air Corp. v. Air Ambulance Authority*, 843 F.2d 1187 (9th Cir. 1988), is misplaced. That case held that defendant did not, by reason of having been designated by the state as an exclusive ambulance dispatcher, become immune against a claim that it had restrained competition in the market for air ambulance services. The immunity which attached to dispatch services did not extend to activities in the separate and distinct market for ambulance services. But that reasoning does not apply where, as here, the restraint complained of occurred (though not exclusively) in the course of the protected conduct, i.e. the collective development of terms for policies to be issued by the participating insurers, which was exactly what the states permitted to be done.

(b) State Supervision

State action immunity applies only where the state actively supervises "to ensure that [it] will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies." *Patrick v. Burget*, 486 U.S. 94, 108 S.Ct. 1658, 1663, 100 L.Ed.2d 83 (1988). Plaintiffs argue that state supervision in this case does not reach the restraints alleged, i.e., "the agreements and acts to limit or eliminate the availability of consumer-demanded coverages."

(Unified Opp. 58.) But in *Patrick*, the Court specifically referred to the state public service commission's "ultimate authority and control over all intrastate rates" in *Southern Motor Carriers Rate Conference* as an example of what constitutes active supervision. *Id.* (quoting *Southern Motor Carriers Rate Conference*, 471 U.S. at 51, 105 S.Ct. at 1723). As noted above, there, as here, supervision took the form of approval, disapproval, or modification of the end product of the collective action. That degree of supervision was sufficient protection of the public interest, without the necessity of additional supervision of the manner in which the participants conducted the collective process.

Plaintiffs contend that, even if the state action immunity otherwise applied, its application here is barred by the McCarran Act which, they contend, specifically reserves application of the Sherman Act to boycott and coercion. *Cf. Ballard v. Blue Shield of Southern W. Va., Inc.*, 543 F.2d 1075, 1078-79 (4th Cir. 1976), *cert. denied*, 430 U.S. 922, 97 S.Ct. 1341, 51 L.Ed.2d 601 (1977). The two immunity doctrines are not congruent and need to be distinguished with care. The McCarran Act, as discussed in section V.A., *supra*, grants to the insurance business a limited immunity from the antitrust laws, conditioned on a degree of state regulation. State action immunity, as discussed here, permits the states to displace the antitrust laws with respect to specified activities actively supervised by the states. *See generally* P. Areeda & H. Hovenkamp, *Antitrust Law* ¶¶ 210.1b, 212.1f, at 113 (Supp. 1988) ("The [Supreme] Court's view of federalism [under *Parker v. Brown*] has left enormous discretion to the states to displace competition."). Plaintiffs' contention was most recently addressed and rejected in *Health Care Equalization Committee v. Iowa Medical Society*, 851 F.2d 1020, 1027 n. 10 (8th Cir. 1988), where the court stated that it would be anomalous to hold that Congress, by adopting the McCarran Act, intended to subject

insurance companies to antitrust liability for actions that would be exempt if engaged in by others.

The state action immunity motion must therefore be granted.

(2) *Statutory Interpretation*

Defendants also contend that because the effects complained of resulted from the actions of the states which approved the use of the revised policy forms, there could have been no restraint of trade. Their reliance on *In re Airport Car Rental Antitrust Litigation*, 521 F.Supp. 568 (N.D. Cal. 1981), *aff'd.*, 693 F.2d 84 (9th Cir. 1982), *cert. denied*, 462 U.S. 1133, 103 S.Ct. 3114, 77 L.Ed.2d 1368 (1983), is, however, misplaced. The restraint complained of in that case flowed from the decision of airport authorities not to lease space to plaintiffs. The fact that that decision may have been influenced by a conspiracy among defendants did not make the defendants responsible for the airport authorities' independent exercise of judgment to exclude plaintiffs. In the instant actions, however, the restraints complained of did not flow from the actions of state regulators who approved or disapproved policy forms; they flowed from the collective actions of defendants by which they allegedly sought to bring about the use of policy forms that restricted available insurance coverage. To the extent that their conduct is not immune from antitrust scrutiny, defendants would be responsible for its consequences.

Defendants also argue that plaintiffs cannot demonstrate the existence of a restraint in the policy form development process. (Reply 1-10.) The argument seems to rest on confusion between Sherman Act liability and the effect of the McCarran Act. There is little question that, in the absence of McCarran Act immunity, allegations of collective action by defendants to bring about reduced coverage for purchasers of insurance would state a claim under Section 1:

> There is no doubt that the members of such [trade] associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm. Agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products. Accordingly, private standard-setting associations have traditionally been objects of antitrust scrutiny.

Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 108 S.Ct. 1931, 1937, 100 L.Ed.2d 497 (1988). It would not matter for purposes of Section 1 that, as defendants argue, the collective action of defendants did not limit an individual insurer's ability to offer broader coverage. (Reply 5.) The individual insurer's continued freedom is relevant only to application of Section 1013(b) of the McCarran Act, the boycott exclusion, not to liability for anti-competitive agreements.

The motion based on statutory interpretation must therefore be denied.

(3) *Causation*

The foregoing analysis also disposes of defendants' contention that plaintiffs were not injured "by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15(a). No states required insurers to adopt the approved forms. Hence, injury flowing from prohibited collective action to coerce competitors to restrict coverage or deny consumers access to insurance coverage, unless otherwise immune, would fall within Section 4 of the Clayton Act.

There being no disputed issues of fact material to the disposition of this motion, and for the reasons stated, defendants' motion for summary judgment on all claims based on defendants' participation in the collective policy development process asserted by states, and plaintiffs in states, other than Alaska, California, Colorado, and Mon-

tana must be granted on the ground of state action immunity, but will otherwise be denied.

C. STANDING

The domestic and foreign reinsurer defendants[21] have moved to dismiss the complaints against them on the ground that plaintiffs do not have standing to complain of actions taken in the reinsurance and retrocessional insurance markets.[22]

The reinsurer defendants characterize the complaints as alleging three distinct insurance markets: primary insurance, reinsurance, and retrocessional insurance. They contend that plaintiffs claim to have participated only in the primary insurance market and that the defendant reinsurers are alleged to have conspired only in the reinsurance and retrocessional insurance markets. On this basis, defendants contend that plaintiffs do not claim to have been directly affected by the alleged conduct of these defendants and that, therefore, plaintiffs do not have standing to assert the antitrust claims pleaded.

To have standing to assert an antitrust claim, a plaintiff must allege that it has suffered harm as a direct result of the defendant's conduct and that this harm is within the scope of the protection of the antitrust laws. *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 478, 102 S.Ct. 2540, 2547, 73 L.Ed.2d 149 (1982). Accepting, as the Court must, the allegations of the complaint, they establish that the terms and availability of reinsurance directly affect the availability of insurance coverage to consumers. As discussed in section V.A.(1), *supra*, plaintiffs' contention is that the reinsurers' alleged conspiracy

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[21] All defendants other than ISO, INA, Hartford, Allstate, Aetna, and CIGNA.

[22] This motion does not include the claims against Merrett and Three Quays alleging an agreement in restraint of trade in the excess and umbrella insurance market.

to eliminate reinsurance for certain CGL coverages "led inexorably to an injury . . . in the interrelated primary insurance market."

The claims against these defendants therefore fall within the analysis in *McCready*, in which a Blue Cross subscriber was found to have standing to challenge an alleged conspiracy between Blue Cross and psychiatrists to deny reimbursement of psychologists' services. Though the restraint occurred in a market (the market for psychiatrists' services) in which plaintiff was not a consumer, the Court reasoned that plaintiff had standing:

> McCready claims that she has been the victim of a concerted refusal to pay on the part of Blue Shield, motivated by a desire to deprive psychologists of the patronage of Blue Shield subscribers. Denying reimbursement to subscribers for the cost of treatment was the very means by which it is alleged that Blue Shield sought to achieve its illegal ends. The harm to McCready and her class was clearly foreseeable; indeed, it was a necessary step in effecting the ends of the alleged illegal conspiracy. Where the injury alleged is so integral an aspect of the conspiracy alleged, there can be no question but that the loss was precisely " 'the type of loss that the claimed violations . . . would be likely to cause.' "

457 U.S. at 479, 102 S.Ct. at 2548 (citations omitted). And that was true even though plaintiff's plan coverage was purchased and paid for by her employer; as a consumer of psychotherapy services, she nevertheless was within the area of the economy threatened by a breakdown of competitive conditions resulting from Blue Cross's refusal to reimburse for services she desired.

Plaintiffs' allegations suffice to establish agreements the direct effect of which, if true, would be to restrain the availability of desired coverages in the markets in which plaintiffs purchase insurance. *Associated General Con-*

tractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983), is distinguishable. There the plaintiff unions complained of a conspiracy by defendants to abrogate or weaken the collective bargaining relationship between the unions and employers. As the Court there observed, "the Union was neither a consumer nor a competitor in the market in which trade was restrained." *Id.* at 539, 103 S.Ct. at 909. And it was "not clear" whether the Union's interests would be served or disserved by enhanced competition in that market. Moreover, the claim of causation between the Union's injury and the alleged restraint contained "somewhat vaguely defined links." *Id.* at 540, 103 S.Ct. at 909.

On the face of the allegations, plaintiffs have standing. The motion based on lack of standing must be denied.

D. GLOBAL CONSPIRACY CLAIM

Foreign reinsurer defendants have moved to dismiss the First Claim of the Second Wave Complaints, the so-called global conspiracy claim. That claim alleges that all defendants, including the moving defendants, engaged in a conspiracy to restrain the market for CGL property and casualty risks and for reinsurance and retrocessional reinsurance by agreeing to limit or eliminate occurrence, pollution, retroactive, and long-tail coverage, which are the subjects of the allegations of the complaints. In other words, this claim links all of the various specific claims of wrong-doing by various groups of defendants in various markets to allege one global conspiracy among all defendants.

The moving defendants are foreign reinsurers doing business in London. They are named in the Second, Third, and Sixth claims of the Second Wave Complaints in connection with discrete conspiracy claims. They make this motion on the ground that the First Claim merely lumps

together the separate conspiracies elsewhere alleged without any allegation indicating how the separate conspiracies became a single global conspiracy. (Def. Memo. 4.) No question is raised as to the sufficiency of the pleading of the discrete conspiracies in the other claims.

Plaintiffs respond that the complaints "allege that all of the defendants were conspirators who intended to prevent the States from obtaining consumer-demanded insurance coverages." (Unified Opp. 106.) Plaintiffs' theory is that because "the conspiracies alleged are linked by a common purpose, by overlapping defendants and by interconnected acts," a jury could find a single global conspiracy among all the participants in the separate conspiracies. (*Id.* at 109-10.)

A conspiracy is a combination of two or more persons acting in concert to accomplish a common unlawful purpose. A coconspirator need not know the identity of all other conspirators or the full extent of the conspiracy. *E.g., United States v. Metropolitan Enterprises, Inc.*, 728 F.2d 444, 450-51 (10th Cir. 1984). But there must be a common agreement and understanding. Mere identity of purpose, interconnected events, and shared participants, on which plaintiffs base their claim, do not link separate conspiracies into one overall, single conspiracy. (*See* Unified Opp. 110-12.) For separate activities to result in a single conspiracy, the allegations and proof must reflect a wheel and spoke arrangement in which a single person at the hub implements the conspiracy by a series of arrangements with others to carry out the purpose of their conspiracy. *See, e.g., United States v. Levine*, 546 F.2d 658, 662-63 (5th Cir. 1977). But such separate activities, even if for a common purpose, do not constitute a conspiracy "without the rim of the wheel to enclose the spokes." *Kotteakos v. United States*, 328 U.S. 750, 755, 66 S.Ct. 1239, 1243, 90 L.Ed. 1557 (1946). There must be a connection among all the alleged participants sufficient to support a finding that they had entered into the

alleged conspiracy. *Id.* at 754, 66 S.Ct. at 1242. *See also Pinhas v. Summit Health, Ltd.*, 880 F.2d 1108 (9th Cir. 1989) ("Pinhas alleges . . . that as a result of his refusal to sign the 'sham' contract, appellees entered into *a* conspiracy . . . to suspend and terminate his medical staff privileges . . . and to have the report of his termination disseminated. . . .") (emphasis added).

Plaintiffs have made no attempt to show the existence of such a connection to support a finding of a single overall conspiracy, and the allegations of the complaint would not permit proof of one. They allege a number of different conspiracies having different members and different subject matter. For example, the Fifth Claim of the Second Wave Complaints charges some defendants, some of whom are not named elsewhere, with having conspired to restrict the terms under which property insurance and reinsurance would be provided for North American risks. Property insurance has not been alleged to have a connection with CGL insurance or with the market in which CGL insurance is sold. Thus, if all of the facts alleged in the complaint were proved at trial, a conspiracy verdict against these defendants under the First Claim could not stand. The motion of these defendants to dismiss the First Claim of the Second Wave Complaints must therefore be granted.[23]

E. SUBJECT MATTER JURISDICTION AND COMITY

The defendants named in the Sixth and Eighth Claims of the First Wave Complaints and the Fourth and Fifth Claims of the Second Wave Complaints[24] have moved to dismiss those claims for lack of subject matter jurisdic-

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[23] At the hearing, the remaining defendants joined in this motion. No objection having been made, this claim will be dismissed against all defendants.

[24] These claims will be referred to collectively as the Sixth Claim and the Eighth Claim, respectively.

tion or on the basis of international comity.[25] The motion is based on the Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, 96 Stat. 1246 ("FTAIA"), and on the doctrine of international comity as stated in *Timberlane Lumber Co. v. Bank of America.*[26]

The following allegations are relevant:

In the Fifth Claim, plaintiffs allege that the defendant London reinsurers agreed to restrict the terms on which reinsurance would be written and to refuse to reinsure risks written on the occurrence form or "long-tail" risks. They allege agreements among defendants, coercion and intimidation of primary insurers to use the claims-made form and reject the occurrence form, and coercion and intimidation of individuals who might communicate with regulatory bodies. (Conn.Compl't ¶¶ 91, 93, 127-128; Cal. Compl't ¶¶ 87, 89, 133-134.) As a result, it is alleged that occurrence liability has become unavailable for many risks and the price of such coverage has increased. (Conn. Compl't ¶ 129; Cal. Compl't ¶ 135.)

In the Sixth Claim, plaintiffs allege that, at a meeting in London, the defendant London reinsurers and one reinsurance broker agreed that all North American casualty reinsurance treaties would be written with a pollution exclusion (Conn.Compl't ¶ 99; Cal. Compl't ¶ 95) lessening the availability and affordability of pollution liability coverage from primary insurers throughout the United States (Conn.Compl't ¶ 97; Cal. Compl't ¶ 93).

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[25] At the hearing these defendants asked that their motion be treated as encompassing also the Fifth Claim of the First Wave Complaints and the Third Claim of the Second Wave Complaints (collectively referred to as the Fifth Claim). No objections having been made, the issues having been fully briefed, and in the absence of prejudice to plaintiffs, this request is granted.

[26] *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597, 614 (9th Cir.1976) (*"Timberlane I"*), *on remand*, 574 F.Supp. 1453 (N.D.Cal.1983), *aff'd*, 749 F.2d 1378 (9th Cir.1984) (*"Timberlane II"*), *cert. denied*, 472 U.S. 1032, 105 S.Ct. 3514, 87 L.Ed.2d 643 (1985).

In the Eighth Claim, plaintiffs allege that a group of London retrocessional reinsurers, including the seven named defendants, agreed in 1987 to boycott retrocessional reinsurance treaties which included coverage for North American property risks, unless the original insurance coverage contained a seepage, pollution, and contamination exclusion clause. (Conn.Compl't ¶ 138(b); Cal.Compl't ¶ 149(b).) As a result, seepage and pollution coverage has been excluded from policies on American risks, and prices for such coverage have been increased. (Conn.Compl't ¶ 139; Cal.Compl't ¶ 150.)

(1) *The Factual Background*

The London insurance markets in which the defendants named in the Fifth, Sixth, and Eighth Claims conduct their reinsurance and retrocessional reinsurance business are composed of underwriters at Lloyd's of London, other London insurance firms ("London Company Market" firms), and brokers who obtain coverage in these markets. *See, e.g., Edinburgh Assurance Co. v. R.L. Burns Corp.*, 479 F.Supp. 138, 144 (C.D. Cal. 1979), *aff'd in part and rev'd in part on other grounds*, 669 F.2d 1259 (9th Cir. 1982); *Syndicate 420 at Lloyd's, London v. Early American Ins. Co.*, 796 F.2d 821, 824 (5th Cir. 1986); *Travelers Indemnity Co. v. Booker*, 657 F.Supp. 280, 282-83 (D.D.C. 1987).

As described in *Edinburgh Assurance*, the purchase and sale of insurance in London takes place on the floor of the underwriting room at Lloyd's and in the offices of individual insurance companies. A Lloyd's or London Company Market agent evaluates and negotiates proposed insurance placements brought by brokers for the consideration of the syndicate of underwriters that the agent represents.[27] 479 F.Supp. at 145. A "slip" (a broker-

[27] Underwriters at Lloyd's must be individuals trading for their own accounts. However, underwriters band together into syndicates represented by one or more underwriting agents. Department of

originated document containing the essential features of the coverage sought) is presented to each underwriter. *Id.* Because many risks are too large to be insured by just one London market participant, the broker circulates the slip among numerous underwriting agents, each of whom makes the individual decision whether to underwrite a portion of the risk. *See id.* Because the spreading of large risks in the London reinsurance and retrocessional insurance markets necessarily requires numerous subscribers (*see* Conn.Compl't ¶ 4(w); Cal.Compl't ¶ 28), negotiations over the terms and conditions on which risks will be accepted and insured are integral to the functioning of the market. Underwriters negotiate with brokers over the terms on which they are willing to accept a risk. Because different underwriters may be willing to accept a particular risk on different terms, brokers and underwriters may have to negotiate mutually agreeable terms and conditions on which that risk will be accepted. *See Edinburgh Assurance*, 479 F.Supp. at 145.

The sequence of insurance transactions resulting in the purchase of reinsurance and retrocessional reinsurance in the London markets begins with the purchase of primary insurance by the consumer. The primary insurer in the United States may then elect to reinsure some portion of the portfolio of risks it has underwritten. (Conn.Compl't ¶ 4(p); Cal.Compl't ¶ 26.) The form of reinsurance most pertinent to these cases is known as "treaty" reinsurance (Cal.Compl't ¶ 27), in which the reinsurance company agrees in advance to indemnify a primary insurance company for a defined portion of the risks to be assumed by the primary carrier during the treaty period (Conn. Compl't ¶ 4(w); Cal.Compl't ¶¶ 4(p), 27). As a participant in a reinsurance treaty, a reinsurer does not deal directly with primary insurance consumers or individual

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the Treasury, Report to Congress on the Taxation of Income Earned by Members of Insurance or Reinsurance Syndicates 5-6 (February, 1989).

risks and may never know the identity of individual risks within the portfolio of risks included in the treaty. *See Excess and Casualty Reinsurance Ass'n v. Ins. Comm'r*, 656 F.2d 491, 492, 495 (9th Cir. 1981); *American Re-Insurance Co. v. Insurance Comm'r*, 527 F.Supp. 444, 453 (C.D. Cal. 1981). When the primary insurer seeks reinsurance coverage in the London market, one of several reinsurance centers, it initiates the type of reinsurance transaction which is the subject of the Sixth Claim.

Reinsurers also purchase reinsurance. This step in the sequence of reinsurance transactions, and the one which is the subject of the Eighth Claim, may occur in the London market for retrocessional reinsurance. Retrocessional reinsurance means reinsurance of the business written by reinsurers. (*See also* Conn.Compl't ¶ 4(r); Cal.Compl't ¶ 107.) Plaintiffs' Eighth Claim refers to the so-called LMX market which consists of those retrocessional reinsurers who specialize in providing retrocessional reinsurance for Lloyd's of London and the London Company Market firms. (Conn. Compl't ¶ 111; Cal.Compl't ¶ 107.) At this level, the purchaser of retrocessional reinsurance is a Lloyd's or London Company Market reinsurer.

(2) *Subject Matter Jurisdiction*

By virtue of the FTAIA, the Sherman Act does "not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations . . ." unless that conduct has a "direct, substantial, and reasonably foreseeable effect" on commerce within the United States, import trade into the United States, or export trade engaged in by a person within the United States. 15 U.S.C. § 6a.

Plaintiffs contend that the conduct alleged involved agreements to restrain the provision of reinsurance for American risks, and hence the import into the United States of insurance services. These allegations are sufficient to invoke the import exception of the FTAIA.

Defendants contend that the FTAIA applies nevertheless because the conduct complained of in these claims is wholly foreign commerce. The subject matter of the alleged agreement, however, concerned the provision of reinsurance within the United States, and the allegations of effects in United States markets are sufficient to preclude a characterization of wholly foreign commerce.

The First Wave Complaints allege that the London market is one of the three principal markets for the supply of reinsurance (Cal.Compl't ¶ 29), and all complaints allege that the agreements made in the London market had the effect of limiting the ability of primary insurers to obtain reinsurance except on certain terms, and for a higher price (Conn.Compl't ¶¶ 97, 100, 134, 139; Cal.Compl't ¶¶ 138, 140, 148, 150). The complaints further allege that the availability of primary coverage hinges on the primary insurers' ability to obtain reinsurance of risks (Conn.Compl't ¶ 4(p); Cal.Compl't ¶ 34), and that the availability of reinsurance hinges on the availability of retrocessional reinsurance (Conn.Compl't ¶¶ 110, 114; *see* Cal.Compl't ¶ 150). Thus, plaintiffs have adequately alleged that a decision not to provide reinsurance or retrocessional reinsurance to cover certain types of risks in the United States has a direct effect on the availability of primary insurance in the United States. *Cf. McGlinchy v. Shell Oil Co.*, 845 F.2d 802, 815 (9th Cir. 1988) (no direct, substantial, and reasonably foreseeable effect on United States commerce where agreements involved orders for products in South East Asia and other areas outside the United States). Therefore, the FTAIA does not apply.

Where the FTAIA does not apply, the Court must determine whether it has subject matter jurisdiction under the analysis in *Timberlane I:* (1) whether the alleged restraint affected or was intended to affect the foreign commerce of the United States, and (2) whether

it is a cognizable violation of the Sherman Act.[28] 549 F.2d at 615. The allegations that establish a direct effect in the United States are sufficient to establish this Court's subject matter jurisdiction under *Timberlane I*.

(3) *International Comity*

Regardless of whether subject matter jurisdiction exists, this Court may determine that its jurisdiction under the antitrust laws should not be exercised on the ground of international comity. *See Timberlane I*, 549 F.2d at 613-14.[29] This issue is properly raised and disposed of by

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[28] There is some uncertainty whether the *Timberlane* analysis for extraterritorial application of the antitrust laws has been superseded by the FTAIA. It is arguable that the FTAIA codifies the standard for determining whether there is extraterritorial jurisdiction for all cases, not only for those cases involving non-import trade. *See* P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 236, at 235 (Supp.1988) ("The most interesting question about the new statute is whether its standard for appraising export restraints differs from that for appraising import restraints or whether it merely 'codifies' a general understanding of when American antitrust should be concerned about restraints abroad that might affect United States interests only indirectly, insubstantially, or unforeseeably."); Hawk, *International Antitrust Policy and the 1982 Acts: The Continuing Need for Reassessment*, 51 Fordham L.Rev. 201, 222 (1982) ("[i]t is . . . not clear whether the specific effect test set forth in the Act is limited to determining whether export transactions of purely foreign transactions have the requisite effect on United States trade. The test might also be used in determining whether *import* transactions . . . have the requisite effect on United States trade.") See also the dictum in *McGlinchy*, 845 F.2d at 813 n. 8, that the FTAIA was passed "[i]n an effort to provide a single standard for the issue of extraterritorial application of the Sherman Act." In that case, however, the FTAIA clearly applied because export and foreign transactions were involved.

Until there is a clearer indication that *Timberlane I* no longer controls, however, this Court must follow it.

[29] The legislative history of the FTAIA states that "[i]f a court determines that the requirements for subject matter jurisdiction

a Rule 12(b)(1) motion so long as the merits of plaintiffs' antitrust claims are not reached. *Timberlane II*, 749 F.2d at 1382.

Timberlane I established a rule of reason controlling the extraterritorial application of the antitrust laws. It requires an analysis of whether, as a matter of international comity and fairness, extraterritorial jurisdiction should be asserted. *Timberlane I*, 549 F.2d at 615.

This analysis is governed by seven factors:

> [T]he degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States compared with conduct abroad.

Id. at 614. Each of these seven factors, discussed below, must be balanced in every case. *Timberlane II*, 749 F.2d at 1383 n. 3; *see also Star-Kist Foods, Inc. v. P.J. Rhodes & Co.*, 769 F.2d 1393, 1395 (9th Cir. 1985) (applying *Timberlane* factors to extraterritorial application of the Lanham Act); *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 428-29 (9th Cir. 1977) (same). The object of this analysis is to determine whether "the contacts and interests of the United States are sufficient to

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are met, this bill would have no effect on the courts' ability to employ notions of comity, *see, e.g., Timberlane Lumber Co. v. Bank of America*, 549 F.2d 1287 (3rd Cir.1979) [sic]." H.R.Rep. No. 97-686 at 13 (1982), *reprinted in* 1982 U.S.Code Cong. & Admin.News at 2431, 2487, 2498.

support the exercise of extraterritorial jurisdiction." *Timberlane I*, 549 F.2d at 614-15.[30]

(a) Degree of Conflict With Foreign Law or Policy

The London reinsurance and retrocessional reinsurance business, the subject of these claims, takes place in a regulatory and competitive framework established by the British government. In 1870, Parliament, by the Lloyd's Act, established the Society of Lloyd's and empowered it to regulate the marketplace composed of its members. The Lloyd's governing body continues to be empowered to exercise quasi-governmental authority in regulating the activities of its members. Lloyd's Acts, 1870-1982. The London Company Market companies are incorporated in the United Kingdom in accordance with the Companies Act, 1985, are regulated by the Insurance Companies Act, 1982, and associated regulations, and are supervised by the British Department of Trade and Industry. Agreements among British insurers, reinsurers, and retrocessional reinsurers (including both Lloyd's and London Company Market underwriters) relating to the provision of insurance services are expressly exempted from British regulation of anti-competitive agreements. *See* Restrictive Trade Practices (Services) Order 1976, S.I. 1976 No. 98, Schedule ¶ 8.

Plaintiffs argue that, because the Treaty of Rome of 1957, which governs trade regulation in the European

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[30] *Timberlane* has been criticized for requiring courts to balance American and foreign interests which they are not equipped or qualified to do. *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 948-50 (D.C.Cir.1984) (substantial limits on court's ability to conduct balancing); Aldisert, *Federal Courts and Extraterritorial Antitrust Law: Enlightened Self Interest or Yankee Imperialism?*, 5 J.L. & Com. 415, 419-20, 426-29 (1985) (courts unaccustomed to evaluating interests of other nations); Note, *Forum Non Conveniens and the Extraterritorial Application of United States Antitrust Law*, 94 Yale L.J. 1693 (1985) (courts poorly equipped). Its authority in this circuit, however, remains unimpaired.

Economic Community, is part of the law of England, *In re Westinghouse Uranium Contract* [1978] A.C. 547, 564, there is no conflict with English law or policy. Article 85 of the treaty prohibits

> all agreements . . . and concerted practices . . . which have as their object and effect the prevention, *restriction* or distortion *of competition within the common market* and in particular those which: (a) . . . fix purchase or selling prices or any other trading condition; [or] (b) limit or control production, markets, technical development, or investments. . . .

(Emphasis added.) Article 85 has been held to outlaw restrictive practices in the insurance industry notwithstanding its regulation by the state in which it is located. *Verband der Sachversicherer eV v. E.C. Commission*, 4 Common Mkt.Rep. (CCH) 264 (1988). Article 85, plaintiffs contend, establishes that enforcement of American antitrust law is consistent with applicable foreign law.

It seems doubtful, however, that this Article would be applied to outlaw long-standing practices in the London reinsurance market, openly conducted in conformity with English law. Moreover, the Treaty of Rome by its terms applies only to trade between member states, not to trade with a non-member such as the United States, and Article 85 applies only to restriction of competition within the common market.

With respect to the relevant United States-English trade, the evidence of conflict between the antitrust laws and English law and policy is substantial. English courts have repeatedly expressed unmitigated hostility to the extraterritorial application of American antitrust laws. *See In re Westinghouse Uranium Contract*, 1978 A.C. 547, 591 (counsel for the government), 616 (Judgement of Lord Wilberforce), 639 (Judgement of Lord Diplock), 650 (Judgement of Lord Fraser of Tullybelton); *British Nylon Spinners, Ltd. v. Imperial Chemical Industries,*

Ltd., [1952] 2 All E.R. 780 (CA), (LEXIS, Enggen library, Cases file at 10) (Judgement of Sir Evershed, M.R.). *See also Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 946 (D.C. Cir. 1984).

An English "blocking" statute restricts the availability of evidence and production of documents for use in judicial proceedings in the United States. Protection of Trading Interests Act, 1980, ch. 11, § 2, *reprinted in* Antitrust & Trade Reg.Rep. (BNA) No. 959, at F-1; *see* Note, *Power to Reverse Foreign Judgments: The British Clawback Statute Under International Law*, 81 Colum.L.Rev. 1097, 1106-09 (1981) (describing the blocking provision of the Protection of Trading Interests Act). The Protection of Trading Interests Act provides a remedy to English antitrust defendants to recover from plaintiffs the punitive portion of a foreign multiple damage judgment against them where the foreign judgment concerns activities outside the enforcing nation's territory.[31] Protection of Trading Interests Act, *supra*, at § 6; *see* Note, 81 Colum.L.Rev. at 1109-13 (describing section 6 of the Act). This Act has been applied several times notwithstanding the Treaty of Rome. *See* Cira, *The Challenge of Foreign Laws to Block American Antitrust Actions*, 18 Stan. J. Int'l L. 247, 251-52 & n. 29 (1982) (between its passage and 1982, the Act applied to issuance of directives barring compliance with American orders, some of which involved U.K. subsidiaries of U.S. parents).

On balance, the Court concludes that enforcement of the antitrust laws against activities in the London reinsurance market would lead to significant conflict with English law and policy. This conflict, unless outweighed

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[31] This ("clawback") provision was aimed at the "pernicious extraterritorial effect doctrine" of American antitrust law. 973 Parl. Deb., H.C. (5th Series) 1535 (1979). It also reflects a view that multiple damages are penal and should be imposed only in proceedings incorporating the protections of criminal proceedings. *See* Note, 81 Colum.L.Rev. at 1103-04.

by other factors in the comity analysis, is itself a sufficient reason to decline exercise of jurisdiction. *Timberlane II*, 749 F.2d at 1384.

(b) The Nationality or Allegiance of the Parties and the Locations of Principal Places of Business of Corporations

All plaintiffs are located in the United States. Although all defendants named in the Fifth, Sixth, and Eighth Claims are located in England and are of English nationality, many of the corporate defendants are subsidiaries of American corporations and may be influenced by the allegiance of their American parents.[32] But it is also true that adjudication of this claim would require the testimony of witnesses and the production and analysis of documents located in England. *See Timberlane II*, 749 F.2d at 1384; *Star-Kist*, 769 F.2d at 1396.

On balance this factor weighs against the exercise of jurisdiction.

(c) The Extent to Which Enforcement by Either State Can Be Expected to Achieve Compliance

A number of barriers stand in the way of enforcement of any judgment against these defendants by English courts. Those courts have previously refused to aid in the enforcement of the judgment of an American court where that court had exercised what the English court considered unlawful extraterritorial jurisdiction. *See British Nylon Spinners, Ltd. v. Imperial Chemical Indus-*

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[32] Note that England, however, does not recognize the extraterritorial application of the laws of the parent corporation's state based on the parent's control of the subsidiary. Note, 81 Colum. L.Rev. at 1100-01. English authorities, moreover, take the position that, in any event, the laws and policies of the territorial state must be accorded primacy. *See* Griffin, *Possible Resolutions of International Disputes Over Enforcement of U.S. Antitrust Law*, 18 Stan. J. Int'l L. 279, 286 (1982).

tries, Ltd., 1 Ch. 19 (1953); 1 Ch. 37 (1955); *see also* the discussion at section V.E.(3)(b), *supra.*

Plaintiffs could collect a judgment by enforcing it against such assets of defendants as may be found in the United States. But it is improbable that there could be enforcement of the requested injunctive relief against activities in London. Indeed, the Protection of Trading Interests Act allows the British Secretary of State for Industry to forbid British nationals from complying with foreign antitrust judgments. Protection of Trading Interests Act, *supra*, at § 1; *see* Note, 81 Colum.L.Rev. at 1104-06.

Thus this factor tips slightly against the exercise of jurisdiction.

(d) The Relative Significance of Effects on the United States as Compared With Those Elsewhere

This factor requires a comparison of the effect of the alleged illegal conduct on the commerce of the United States with its effect abroad. *Timberlane II*, 749 F.2d at 1384.

Plaintiffs allege that half of the reinsurance business covers North American risks. (Conn.Compl't ¶ 4(h); Cal.Compl't ¶ 4(t).) There are no allegations showing what percentage of those risks involved reinsurance for CGL policies covering risks within the United States. And there are no allegations with respect to the relative effects of retrocessional reinsurance agreements. It is clear, however, that the conduct of defendants had a sufficiently significant effect in the United States to make this factor weigh in favor of the exercise of jurisdiction.

(e) The Extent to Which There is Explicit Purpose to Harm or Affect United States Commerce

As in *Timberlane II*, the conduct of defendants complained of in these claims was directed primarily at re-

ducing their exposure to certain risks and controlling losses, a legitimate business purpose. Their actions (as described in section V.E.(1) *supra*) were "consistent with [local] customs and practices." *Timberlane II*, 749 F.2d at 1385. The allegations of the complaints that defendants' purpose was to restrict the availability of certain types of CGL coverage (Conn.Compl't ¶¶ 132, 137; Cal. Compl't ¶¶ 138, 148) is not inconsistent with the existence of a legitimate business purpose for their actions.

This factor, therefore, weighs against the exercise of jurisdiction.

(f) Foreseeability of Such Effect

Defendants concede that the factor of foreseeability of the effect in the United States of their conduct weighs in favor of the exercise of jurisdiction. (Def.Memo. 23.)

(g) The Relative Importance to the Violation Charged of Conduct Within the United States as Compared with Conduct Abroad

The conduct of the defendant reinsurers or retrocessional reinsurers alleged in the Sixth and Eighth Claims is not alleged to have occurred within the United States. Some of the conduct alleged in the Fifth Claim, however, allegedly occurred in the United States. Defendants are alleged to have coerced primary insurers and to have communicated with others to bring about rejection of the occurrence form. Thus relevant conduct occurred within the United States, but its genesis lay in the alleged agreements among the participants in the London market and its purpose was to further those agreements. The alleged activities in the United States are an incident of the market agreement which is the gravamen of the action.

Although the activities within the United States are not insignificant, their significance derives from the alleged foreign agreements. In those circumstances, this factor must be considered as neutral.

(h) Conclusion

The foregoing analysis leads to the conclusion that the conflict with English law and policy which would result from the extra-territorial application of the antitrust laws in this case is not outweighed by other factors. Although the conduct complained of had effects within the United States, it is not alleged to have excluded competitors from markets or denied consumers access to markets, and it is not alleged to have occurred for that purpose.

The pendent state law claims assert claims similar to those arising under the federal antitrust laws. To the extent that they are based on the conduct alleged in the Fifth, Sixth, and Eighth Claims, they should be dismissed for the same reasons. *See United Mine Workers of America v. Gibbs*, 383 U.S. 715, 727, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966); *Salveson v. Western States Bankcard Ass'n*, 731 F.2d 1423, 1430 (9th Cir. 1984).

VI. CONCLUSION

Subsequent to the issuance of this ruling, plaintiffs for the first time asked for leave to amend their complaints. The Court has examined Attachment A to plaintiffs' memorandum to vacate judgment or for leave to amend or permit discovery, setting forth the substance of the proposed amendments. Nothing in that attachment would affect the grounds for the Court's ruling. The plain fact is that plaintiffs seek to recover on a theory that, as heretofore explained at length, will not stand under the law.

For the same reason, plaintiffs' discovery request must be denied. That request is based on rather unprofessional assertions to the effect that the Court criticized or faulted the states for not producing evidence or taking discovery and on a misrepresentation of the Court's ruling. (Plf. Memo. 12.) The States have conducted investigations into the subject matter of these actions for some two years,

with all the investigatory powers available to sovereign governments. They were given the right under the pretrial order to conduct discovery relevant to the issues raised by defendants' motions. They are represented by numerous attorneys expert in the antitrust laws. The Court must conclude that the allegations they made in their complaints and the facts they proffered in opposition to the motions represent their best effort—and nothing indicates the contrary.

The Court's ruling accepts the facts alleged in plaintiffs' complaints and their opposition to the motions, and it rests on those facts. There are no factual disputes material to this ruling, which simply applies the law to those facts.

For the reasons stated, judgment will be entered for all defendants dismissing the federal claims in these actions in accordance with the foregoing ruling. The pendent state claims will be dismissed for lack of subject matter jurisdiction, except as otherwise ordered.

IT IS SO ORDERED.

APPENDIX

Actions in MDL Docket 767
Insurance Antitrust Litigation

88-0981

State of California, et al. v. Hartford Insurance Company, Aetna Casualty and Surety Company, CIGNA Corporation, Insurance Services Office, Inc., Peter N. Miller, Robin A.G. Jackson, Merret Underwriting Agencies Mgt., Ltd., Three Quays Underwriting Ltd., Janson, Green, Ltd., Edwards and Payne Management (U.A.), Ltd., C.J. Warrilow-Hine & Butcher, Ltd., J. Brian Hose & Others, Ltd., Harvey Bowring, Ltd.—Murray Lawrence & Partners, K.F. Alder & Others, (U.A.) Ltd., Unionamerica Insurance Co., Ltd.

88-0983

State of New York, et al. v. Hartford Fire Insurance Company, et al.

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Commonwealth of Massachusetts, et al. v. Hartford Fire Insurance Company, et al.

88-0985

State of Minnesota, et al. v. Hartford Fire Insurance Company, et al.

88-0986

State of West Virginia, et al. v. Hartford Fire Insurance Company, et al.

88-0987

State of Wisconsin v. Hartford Fire Insurance Company, et al.

88-0988

State of Alabama, et al. v. Hartford Fire Insurance Company, et al.

88-1009
State of Arizona, et al. v. Hartford Fire Insurance Company, et al.

88-1318
Big D Building Supply Corp. v. Hartford Fire Insurance Company, et al.

88-1492
Anastasios Markos T/A v. Hartford Fire Insurance Company, et al.

88-1587
Bay Harbor Park Homeowner's Association, Inc. v. Aetna Casualty

88-2327
State of Maryland v. Hartford Fire Insurance Company, et al.

88-2328
State of Washington, et al. v. Hartford Fire Insurance Company, et al.

88-2329
State of New Jersey v. Hartford Fire Insurance Company, et al.

88-2330
State of Colorado v. Hartford Fire Insurance Company, et al.

88-2331
State of Ohio, et al. v. Hartford Fire Insurance Company, et al.

88-2332
State of Connecticut v. Hartford Fire Insurance Company, et al.

88-2333
Commonwealth of Pennsylvania, et al. v. Hartford Fire Insurance Company, et al.

88-2334
State of Alaska, et al. v. Hartford Fire Insurance Company, et al.

88-2335
State of Montana v. Hartford Fire Insurance Company, et al.

88-2341
State of Michigan, et al. v. Hartford Fire Insurance Company, et al.

88-2569
Environmental Aviation Sciences, Inc. v. Hartford Fire Insurance Company, et al.

88-3662
Carlisle Day Care Center, Inc. v. Hartford Fire Insurance Company, et al.

88-3673
Discount Plywood Centers, Inc. v. CIGNA Corporation, et al.

88-3674
Acme Corrugated Box Co. v. CIGNA Corporation, et al.

88-3677
P & J Casting Corp. v. Hartford Fire Insurance Company, et al.

88-3792
Henry L. Rosenfeld v. Hartford Fire Insurance Company, et al.

88-3793
Ace Check Cashing, Inc. v. Hartford Fire Insurance Company, et al.

88-4538
Glabman Paramount Furniture Mfg. Co., Inc. v. CIGNA Corporation, et al.

88-4560
Durawood, Inc. v. CIGNA Corporation, et al.

88-4561
Bensalem Township Authority v. CIGNA Corporation, et al.

88-4562
Keyboard Communications, Inc. v. CIGNA Corporation, et al.

88-4564
Carmella M. "Boots" Liberto v. Hartford Fire Insurance Company, et al.

88-4799
Les-Ray Bobcat, Inc., et al. v. Hartford Fire Insurance Company, et al.

88-4800
Jerry Grant Chemical Associates, Inc. v. Hartford Fire Insurance Company, et al.

89-1131
State of Louisiana, et al. v. Hartford Fire Insurance Company, et al.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: INSURANCE ANTITRUST LITIGATION

No. 89-16405

DC# CV-88-1688-WWS

ACE CHECK CASHING, INC.; ACME CORRUGATED BOX COMPANY, INC.; ANASTASIOS MARKOS, t/a Municipal Exxon; BAY HARBOR PARK HOMEOWNER'S ASSOCIATION, INC.; BENSALEM TOWNSHIP AUTHORITY; BIG D BUILDING SUPPLY CORPORATION, *et al.*,

Private Plaintiffs,
Plaintiffs-Appellants,

and

STATE OF ALABAMA *et al.*,

Plaintiffs,

vs.

AETNA CASUALTY AND SURETY COMPANY; ALLSTATE INSURANCE COMPANY; CIGNA CORP.; HARTFORD FIRE INSURANCE COMPANY, *et al.*,

Defendants-Appellees.

No. 89-16405

DC# CV-88-1688-WWS

STATE OF CALIFORNIA; CITY OF LAFAYETTE, CITY AND COUNTY OF SAN FRANCISCO; COUNTY OF SAN BENITO,

Plaintiffs-Appellants,

and

STATE OF ALABAMA *et al.*,
Plaintiffs,

vs.

AETNA CASUALTY AND SURETY COMPANY; ALLSTATE INSURANCE COMPANY; CIGNA CORP.; HARTFORD FIRE INSURANCE COMPANY, *et al.*,
Defendants-Appellees.

No. 89-16513

DC# CV-88-0981-WWS

STATE OF CALIFORNIA; CITY OF LAFAYETTE; CITY AND COUNTY OF SAN FRANCISCO; COUNTY OF SAN BENITO,
Plaintiffs-Appellants,

vs.

INSURANCE SERVICES OFFICE, INC., CMA RE (U.K.) Ltd.; CONTINENTAL REINSURANCE CORPORATION; UNION-AMERICA INSURANCE CO.; EDWARDS & PAYNE Ltd.; EXCESS INSURANCE CO., Ltd.; GENERAL REINSURANCE CORP.; THOMAS A. GREENE & COMPANY, Inc.; KEMPER REINSURANCE LONDON; LLOYD'S UNDERWRITERS & BROKERS; MERCANTILE & GENERAL REINSURANCE COMPANY OF AMERICA; NORTH AMERICAN REINSURANCE CORPORATION; OXFORD SYNDICATE MGMT. Ltd.; (sued herein as K.F. Adler & Others (U.A.) Ltd.); PRUDENTIAL REINSURANCE; REINSURANCE ASSOCIATION OF AMERICA; TERRA NOVA INSURANCE CO.; AETNA CASUALTY AND SURETY COMPANY; ALLSTATE INSURANCE COMPANY; WINTERTHUR REINSURANCE CORPORATION OF AMERICA; CIGNA CORP.; HARTFORD FIRE INSURANCE COMPANY,
Defendants-Appellants.

No. 89-16514

DC# CV-88-0983-WWS

STATE OF NEW YORK; ROOSEVELT ISLAND OPERATING AUTHORITY; VILLAGE OF GROTON; VILLAGE OF LAKE SUCCESS,

Plaintiffs-Appellants,

vs.

HARTFORD FIRE INSURANCE COMPANY; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; ALLSTATE INSURANCE; *et al.*,

Defendants-Appellees.

No. 89-16515

DC# CV-88-0984-WWS

COMMONWEALTH OF MASSACHUSETTS; TOWN OF HANOVER; TOWN OF MILFORD,

Plaintiffs-Appellants,

vs.

HARTFORD FIRE INSURANCE COMPANY; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; ALLSTATE INSURANCE; *et al.*,

Defendants-Appellees.

No. 89-16516

DC# CV-88-0985-WWS

STATE OF MINNESOTA,

Plaintiff-Appellant,

vs.

HARTFORD FIRE INSURANCE COMPANY; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; ALLSTATE INSURANCE; *et al.*,

Defendants-Appellees.

No. 89-16517

DC# CV-88-0986-WWS

STATE OF WEST VIRGINIA; CITY OF CLAY; COUNTY OF HANCOCK; COUNTY OF MINERAL; COUNTY OF WIRT,
Plaintiffs-Appellants,

vs.

HARTFORD FIRE INSURANCE COMPANY; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; ALLSTATE INSURANCE; *et al.*,
Defendants-Appellees.

No. 89-16518

DC# CV-88-0987-WWS

STATE OF WISCONSIN,
Plaintiff-Appellant,

vs.

HARTFORD FIRE INSURANCE COMPANY; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; ALLSTATE INSURANCE; *et al.*,
Defendants-Appellees.

No. 89-16519

DC# CV-88-0988-WWS

CITY OF MOBILE; STATE OF ALABAMA; CITY OF BIRMINGHAM,
Plaintiffs-Appellants,

vs.

AETNA CASUALTY AND SURETY COMPANY; WINTERTHUR REINSURANCE CORPORATION OF AMERICA; CIGNA CORP.; HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE,
Defendants-Appellees.

No. 89-16520

DC# CV-88-1009-WWS

STATE OF ARIZONA,
Plaintiff-Appellant,

vs.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,
Defendants-Appellees.

No. 89-16521

DC# CV-88-2327-WWS

STATE OF MARYLAND,
Plaintiff-Appellant,

vs.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,
Defendants-Appellees.

No. 89-16522

DC# CV-88-2328-WWS

STATE OF WASHINGTON; COUNTY OF COWLITZ,
Plaintiffs-Appellants,

vs.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,
Defendants-Appellees.

No. 89-16523

DC# CV-88-2329-WWS

STATE OF NEW JERSEY,
Plaintiff-Appellant,

vs.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,
Defendants-Appelees.

No. 89-16524

CV-88-2330-WWS

STATE OF COLORADO,
Plaintiff-Appellant,

vs.

WINTERTHUR REINSURANCE CORPORATION OF AMERICA; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE, *et al.*,
Defendants-Appellees.

No. 89-16525

DC# CV-88-2331-WWS

STATE OF OHIO; TOWNSHIP OF JACKSON; COUNTY OF HARDIN,
Plaintiffs-Appellants,

vs.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,
Defendants-Appellees.

No. 89-16526

DC# CV-88-2332-WWS

STATE OF CONNECTICUT,
Plaintiff-Appellant,

vs.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,
Defendants-Appellees.

No. 89-16527

DC# CV-88-2333-WWS

COMMONWEALTH OF PENNSYLVANIA; COUNTY OF SCHUYKILL; CITY OF ALTOONA; CITY OF YORK; BOROUGH OF CHAMBERSBURG,
Plaintiffs-Appellants,

vs.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,
Defendants-Appellees.

No. 89-16528

DC# CV-88-2334-WWS

STATE OF ALASKA,
Plaintiff-Appellant,

vs.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,
Defendants-Appellees.

No. 89-16529

DC# CV-88-2335-WWS

STATE OF MONTANA; COUNTY OF TETON,
Plaintiffs-Appellants,

vs.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,
Defendants-Appellees.

No. 89-16530

DC# CV-88-2341-WWS

STATE OF MICHIGAN,
Plaintiff-Appellant,

vs.

HARTFORD FIRE INSURANCE COMPANY; ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,
Defendants-Appellees.

No. 89-16531

DC# CV-88-1131-WWS

STATE OF LOUISIANA, CITIES OF BATON ROUGE, NEW ORLEANS, SLIDELL, NACHITOCHES and EUNICE,
Plaintiff-Appellant,

vs.

HARTFORD FIRE INSURANCE COMPANY, ALLSTATE INSURANCE; AETNA CASUALTY AND SURETY COMPANY; CIGNA CORP.; *et al.*,
Defendants-Appellees.

[Filed October 15, 1991]

Before: BEEZER, and NOONAN, Circuit Judges, SINGLETON,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Beezer and Noonan have voted to reject the suggestion for rehearing en banc and Judge Singleton expresses no opinion regarding the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

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* The Honorable James K. Singleton, United States District Judge for the District of Alaska, sitting by designation.